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SUPREME COURT, U. S.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Number 73-1050

VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,
Appellant,

Versus

JOHN PAPPAN, Superintendent of the Osage Indian Agency, John Slater, Field Solicitor of the Osage Indian Agency, Raymond L. Sanford, Regional Solicitor of the Department of the Interior, and Walter L. Hickel, Secretary of the Interior,
Appellees,

and Pearl Hall, Terril Rae Bigheart, Bruce W. Gambill, Randy William Bigheart and Matthew Kane, Jr.,
Intervenor-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE TENTH JUDICIAL CIRCUIT

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VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,

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JOHN PAPPAN, Superintendent of the Osage Indian Agency, John Slater, Field Solicitor of the Osage Indian Agency, Raymond L. Sanford, Regional Solicitor of the Department of the Interior, and Walter L. Hickel, Secretary of the Interior,

Appellees,

and Pearl Hall, Terril Rae Bigheart, Bruce W. Gambill, Randy William Bigheart and Matthew Kane, Jr.,

Intervenor-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE TENTH JUDICIAL CIRCUIT

Petitioner prays that a writ of certiorari be issued by this court to review the judgments and holdings entered herein by the Tenth Circuit Court of Appeals, the District Court for the Northern District of Oklahoma and the administrative agencies of the Interior Department.

OPINIONS BELOW

Appearing in the Appendix as Exhibits A through F are the Memorandum, Field Solicitor, Osage Agency, January 31, 1969, (A); the decisions of the Superintendent, Osage Indian Agency, of February 14, 1969, (B); and the Regional Solicitor, Interior Department of August 8, 1969, (C); the summary judgment of the Federal District Court, Northern District of Oklahoma of July 31, 1972, (D); the judgment of the Tenth Circuit Court of Appeals of August 14, 1973, (E); and its decisions of September 21, 1973, denying Appellant's petition for re-hearing, (F).

JURISDICTION

The Circuit Court entered judgment adverse to Appellant on August 14, 1973, and denied her timely filed petition for re-hearing on September 21, 1973, its judgment becoming final on the latter date. (*Chicago G.W.R. Co. v. Basham*, 249 U.S. 164). Jurisdiction of this Court is invoked under 28 USCA 1254 (2).

QUESTIONS PRESENTED

(1) WHETHER SECTION 7 OF THE ACT OF CONGRESS OF FEBRUARY 27, 1925, 43 STAT. 1008, IS APPLICABLE WHERE, AS HERE, THE DECEDENT HAS NOT BEEN SHOWN TO HAVE BEEN OF ONE-HALF OR MORE BLOOD OF THE OSAGE TRIBE OF INDIANS.

(2) WHETHER AN APPELLATE COURT IN REVIEWING AN ADMINISTRATIVE DECISION MUST OPENLY WEIGH THE EVIDENCE SHOWN BY THE RECORD BY MEANS OF A REASONED OPINION BASED UPON STATED FACT OR WHETHER SUCH COURT MAY MERELY STATE ITS CONCLUSION

WITHOUT ANY AFFIRMATIVE SHOWING THAT IT HAS REVIEWED THE WHOLE RECORD.

(3) WHETHER THE FEDERAL ACTS OF 1912 AND 1925 ARE UNCONSTITUTIONAL.

(4) IF THE ACTS OF 1912 AND 1925 ARE CONSTITUTIONAL, WHETHER OKLAHOMA LAW, THE FEDERAL ACT OF 1906 OR THAT OF 1925 DETERMINES THE RIGHT OF A SURVIVING SPOUSE OF AN OSAGE DECEDENT WHOSE WILL BEARS SECRETARIAL APPROVAL TO SHARE IN THE DISTRIBUTION OF HER DECEASED HUSBAND'S ESTATE.

(5) WHETHER THE CIVIL RIGHTS ACTS PROTECT THE RIGHTS OF CITIZENS OF UNDETERMINED RACE AND BLOOD AS WELL AS THOSE OF NEGROES AND INDIANS AND IF SO WHETHER SUCH ACTS TAKE PRECEDENCE OVER THE ACTS OF 1912 AND 1925 AND PROTECT THE RIGHT OF THIS APPELLEE OF UNDETERMINED BLOOD TO TAKE FROM THE ESTATE OF HER HUSBAND, THE DECEDENT, A PERSON OF PART OSAGE INDIAN BLOOD, IN THE EVENT OF HIS DEATH TESTATE A MARITAL SHARE OF HIS ESTATE AS PROVIDED BY THE MARITAL SHARE STATUTE OF THE STATE OF HIS RESIDENCE, DOMICILE, DEATH AND PROPERTY SITUS, AND, IN THE EVENT OF HIS DEATH INTESTATE, A STATUTORY SHARE OF HIS ESTATE AS PROVIDED IN THE STATUTES OF DESCENT OF SUCH STATE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 3 of the Act of Congress of April 18, 1912, 37 Stat. 86, provides in pertinent part:

> "That the property of deceased . . . allottees of the Osage Tribe . . . shall, in probate matters, be subject to the jurisdiction of the . . . courts of the State of Oklahoma."

Section 8 of such Act reads in pertinent part:

> "That any adult member of the Osage Tribe . . . not mentally incompetent may dispose of . . . all of his estate . . . by will, in accordance with the laws of the State of Oklahoma: Provided, that no such will shall . . . have any validity unless approved . . . by the Secretary of the Interior."

Section 7 of the Act of February 27, 1925, 43 Stat. 1008 provides in pertinent part that:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any . . . interest to any . . . interests of the Osage Tribe . . ."

84 Okla. Stat. Ann. 44 provides in pertinent part that:

> ". . . no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law . . ."

84 Okla. Stat. Ann. 213, the Oklahoma statute of descent and distribution, provides in pertinent part that:

> "When any person . . . dies without disposing of the estate by will, it descends and must be distributed in the following manner:
>
> First. If the decedent leave a surviving husband or wife, and only one child . . . in equal shares to the surviving

husband, or wife and child . . . If the decedent leave a surviving husband or wife, and more than one child . . . one-third to the surviving husband or wife, and the remainder in equal shares to his children . . ."

The 5th Amendment to the Federal Constitution reads in pertinent part that:

"No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

The 9th Amendment to such Constitution reads:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

while the 10th Amendment to such Constitution reads that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

That portion of the 14th Amendment pertinent to this case reads that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 USCA 1981 provides that:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 USCA 1982 provides that:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

STATEMENT OF THE CASE

The decedent, William Bigheart, Jr., was but incidentally of part Osage Indian blood. He died in, a citizen and resident of, domiciled in and leaving all his property located in the State of Oklahoma. He was survived by the Intervenors, his Mother and two putative children, and by the Appellant, his wife, who, like Decedent, was, at all times material to this case, a citizen of Oklahoma and of the United States.

84 Okla. St. Ann. 44 provides in pertinent part that:

". . . no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law . . ."

84 Okla. St. Ann. 213 pertains to succession by law and provides in pertinent part that:

"If the decedent leave a surviving husband or wife, and more than one child . . . one-third to the surviving husband or wife, and the remainder in equal shares to his children."

Decedent left a 1965 will which was satisfactory to

Appellant although it made less provision for her than is required by the above statutes. He also left a 1967 will and codicil, executed within ten days of each other, which instruments effectively disinherited the Appellant. Section 3 of the Act of Congress of April 18, 1912, 37 Stat. 86, c. 83 provides that the property of Osage decedents shall be subject to the probate jurisdiction of the courts of the State of Oklahoma while Section 8 of such act provides in pertinent part:

> "That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of . . . all of his estate . . . by will, *in accordance with the laws of the State of Oklahoma*s provided, that no such will shall . . . have any validity unless approved . . . by the Secretary of the Interior."

Appellant submitted the 1965 will, and Intervenors the 1967 will and codicil, to the Osage Agency Superintendent for his approval, such Superintendent being a secretarial delegate approved by Act of Congress (25 USCA la) for such purpose. Appellant, however, preserved an objection that the Secretary had no jurisdiction over such instruments. Hearings were held upon such instruments by the Osage Agency Solicitor who acted without authority of law as an Administrative Examiner and who heard but did not decide the issue of will approval which issue was decided but not heard by the Agency Superintendent. At such hearings Appellant urged that Decedent was marginally competent when he executed the 1965 will but that he was mentally incompetent when he executed the 1967 instruments; that her disinheritance was the product of undue influence exerted over Decedent by his Mother and that no justification existed for Appellant's disinheritance by Decedent.

At the hearings conducted by the Examiner the Appellant made a showing of the marginal mental competency of the Decedent at the time of his execution of the 1965 will.

Intervenors, however, made no effort to show Decedent's competency at the time of his execution of the 1967 instruments except for the testimony of four attesting witnesses, two of whom neither knew nor talked to Decedent, the third neither knowing Decedent or recalling him saying anything other than that he was going to have an operation and wanted to get his will "fixed up" while the fourth was flippant, observed Decedent "maybe five or ten" minutes and could not recall details because, he said: ". . . a lot of water has fell under the bridge since then." Arrayed against such evidence of Decedent's condition at the times of his execution of the 1967 instruments was monumental proof that Decedent was an habitual, long time user of both drugs and intoxicants who earlier in the year had publicly masturbated and had openly sought homosexual relations while sober and in jail; who had executed the 1967 will and its codicil during a sustained drug and alcoholic spree and during a time when he had vomited blood but had refused hospitalization for fear of withdrawal "d.t.'s." Proof was also made that such instruments had been executed by Decedent after he had left his home with Appellant, who had tenderly sought to discourage his drinking and drugging, and while he was living with his Mother who openly admitted giving him alcohol to maintain his "cooperation" and who fought Appellant when she tried to beg Decedent to return to their home. Proof was also made that it was Decedent's Mother who had called to her home the attorney who met there with Decedent and drew the 1967 will and codicil and who prepared Decedent's divorce action at the time of his preparation of the 1967 will. The record shows that Appellant had been a model wife who had at all times provided Decedent a clean, comfortable home with regular, good, wholesome meals and who sat with him, talked with him, watched television with him, played cards with him, drove

him, washed his clothes, visited him in jail and in the hospital, and washed his body when he drunkenly defecated and urinated upon himself.

The 1912 Act in requiring the approval of the will of an Osage decedent is unconstitutional for it furnishes no standard for will approval but gives to the Secretary absolute and unlimited power to approve or disapprove such wills as he sees fit.

The Field Solicitor's (Examiner's) report (p. 3) shows that the evidence tended:

> ". . . to prove that testator's mother interfered with his marriages, encouraged his drinking habits, and unduly influenced his testamentary efforts."

The report, which was accepted by the Agency Superintendent who held adverse to Appellant, recommended approval of the 1967 instruments and disapproval of the 1965 instrument upon the basis of the approval of the subsequent instruments saying that the influence of the mother was not such as to invalidate either the 1967 will or codicil upon the basis of the standards defined by the Oklahoma Supreme Court. The report also substitutes for the standard of mental competency prescribed by the 1912 Act the Oklahoma standard of testamentary capacity, the latter differing substantially from the former as is shown by the fact that the latter presumes mental competency from proof of due execution and attestation of a testamentary instrument and holds a testator may possess testamentary capacity despite such mentally incompetent conditions as senile dementia and insane delusions (*In re William's Estate*, Okla., 1967, 431 P. 2d 366; *Wood v. Wood*, Okla. 1934, 32 P. 2d 715.) The report wholly ignored the duty of the Department to find justification for Appellant's disinheritance by Decedent

prior to approving the 1967 instruments, such duty being spelled out by the *Feahy Memorandum* of the Department of the Interior of August 25, 1933, which holds that proof of mental competency rests upon those asserting it and which holds that the 1912 Act protects the dependents of an Osage testator as well as the testator by requiring proof of justification for the disinheritance of a dependent of an Osage Testator as a condition to Secretarial approval of his will.

An appeal was taken by Appellant to the Secretary of the Interior from the adverse decision of the Agency Superintendent. The appeal was heard over Appellant's objections by a Regional Solicitor whose office was not a constitutional court, nor empowered by the Congress to conduct an appeal and who was not an appellate officer prescribed by 25 USCA la. The Solicitor also ruled adverse to Appellant.

The opinion of the Regional Solicitor substituted the test of testamentary capacity for the standard of mental competency established by the 1912 Act (p. 8). Such opinion ignored Appellant's contention that Decedent's Mother had exercised undue influence over him procuring Appellant's disinheritance and held (p. 10) that: "The 1965 will submitted by the appellant to the Superintendent for approval contains a provision for his mother identical with that contained in the 1967 will." ". . . in view of the size of the estate . . . the devise to his mother . . . is not excessive or unnatural . . ." (p. 11).

Section 8 of the Act of February 27, 1925, ch. 359, § 7, 43 Stat. 1011, and the Act of September 1, 1950 ch. 832, 64 Stat. 572, amending such Act which, together, are referred to herein as the 1925 Act, provide in pertinent part that:

". . . none but heirs of Indian blood shall inherit from

those of one-half or more Indian blood of the Osage Tribe . . . any restricted . . . interest of the Osage Tribe . . ."

Before the holding made by the Regional Solicitor in this case the 1925 Act had been applied only in those cases where the Osage decedent had died intestate or had died leaving a will which had been disapproved by the Secretary of the Interior. Thus, until the time of such holding, the law was well settled that the Act of 1912 was complete in itself except for its reference to Oklahoma law and that the Act of 1925 had no application to any case involving a Department approved Osage will. The result was that shown in *Soderstrom v. Bonner,* 1937, Okla., 71 P. 2d 117; *Revard v. Revard,* 1936 Okla., 63 P. 2d 973; and *In re Mo-se-che-he's Estate,* 107 P. 2d 99; that in cases such as the present case 84 OS 44 governed, the thrust of the Oklahoma cases being summarized by W. F. Semple, Oklahoma Indian Land Titles Annotated, Section 708 (1952), as follows:

"The restrictions placed by state laws upon a testator as to the disinheritance of a spouse and children apply to an Osage will with the same force and effect as to any other citizen of the state."

The Opinion of the Regional Solicitor, however, here imposes the limitation of the Act of 1925 upon a Secretarially approved will for the first time in the history of Osage litigation for the obvious purpose of defeating the operation of 84 Okla. St. Ann. 44.

In an effort to supply justification for Decedent's disinheritance of Appellant the Regional Solicitor stated in his fourth headnote that:

"Evidence that the marital relations between the Decedent and his spouse had deteriorated and that they were estranged at the time he executed a will disinheriting

such spouse is sufficient to support a finding that such will makes a natural disposition of the estate of the Decedent as to such spouse."

Justification for Decedent's disinheritance of Appellant was not found by the Department despite the above statement, for the Department made no finding that the deterioration of such relations and the estrangement of the parties furnished any rational basis for Appellant's disinheritance by Decedent.

Nor did the Solicitor or the District or the Circuit Court of Appeals give any weight to the report of the Examiner that the evidence tended to show that Decedent's Mother interfered with his marriages, encouraged his drinking habits and unduly influenced his testamentary efforts despite the requirements of 5 USCA 706 and *Universal Camera Corp. v. National LRB*, 340 U.S. 474, that in determining the existence of the substantiality of evidence, the reviewing authority was required to review the entire record including the report of the Examiner.

Appellant appealed to the District Court upon the basis of its general equity and appellate powers and jurisdiction to review administrative action taken contrary to the 10th Amendment; its jurisdiction to review such action taken under authority of federal law, treaty, regulation or constitution adversely affecting the Appellant in the exercise of a personal right and her ownership of property; under the provisions of the Administrative Procedure Act, 5 USCA 1001, et seq; the Declaratory Judgment Act, 28 USCA 2201, 2202; the Mandamus Act, 28 USCA 1361; the Civil Rights Acts, 42 USCA 1981, 1982, et seq, and upon the ground that the Acts of Congress of 1912 and 1925 were without constitutional basis or purpose and were grossly over and under-

inclusive, and shocked one's conscience and violated fair play; upon the ground the 1925 Act was based upon an impermissible assumption declared by Intervenors that those prohibited by it from inheriting from Osage decedents were more apt to rape and murder their Osage marital partners of one half or more blood of the Osage tribe of Indians than those permitted to inherit by such act; that both acts were unconstitutional and violated her constitutional rights, including those fixed by and inhering in the 5th, 9th, 10th and 14th Amendments, etc.

The District Court proceedings were conducted by the Magistrate of the Court, the Judge of the Court merely signing an order sustaining Intervenor's motion for summary judgment. Objections were made by Appellant to the conduct of the District Court appeal by the Magistrate upon the ground Appellant was entitled to a judicial hearing (*Olin Industries v. NLRB*, 72 F. Supp. 225, 5 USCA 706); that no finding was made justifying a reference to him and that no order of reference was ever made (Rule 53 (b) and (c), the Government replying upon appeal (CCA Brief) that Rule 35 of the District Court, (which Appellant showed was published after the Magistrate had acted) supplied the necessary justification and reference, etc. Such objections were ignored by both the District and the Circuit Court.

Appellant's motion addressed to the District Court seeking the convocation of a three judge court and her contention that the Civil Rights Acts took precedence over the 1912 and 1925 Acts were ignored by both lower courts while her allegations of the unconstitutionality of the 1912 and 1925 Acts were called frivolous by the District Court.

The District Court held adverse to Appellant who moved for a new trial and for reconsideration, such motion being

denied *sua sponte* by that Court upon the basis of Rule 59 (b) despite Appellant's protest that Rule 6 (e) and (a) also applied. Such protests were ignored by both the District and the Circuit Court.

Upon appeal the Circuit Court substituted for the standard of mental competency established by the Act of 1912 the standard of testamentary capacity of Oklahoma which had been applied by the Department, the latter standard presuming mental competency from proof of due execution and attestation (*Barnes v. Logston, supra*) and permitting the probate of the will of one who was suffering from senile dementia and insane delusions, etc., at the time of his execution of such will. (*In re Williams Estate, supra; Wood v. Wood, supra*).

The Circuit Court gave no consideration to the critical findings of the Examiner earlier referred to nor did it openly weigh the evidence to determine if there was substantial evidence to support the decision of the Superintendent. In addition, it left standing the holding of the Regional Solicitor that a failure of a surviving spouse to prove Indian heritage at a department will hearing conducted under the auspices of the 1912 Act provides a basis for departmental approval of a will of the decedent disinheriting such spouse. Moreover, it determined the issue of undue influence only in respect to the testamentary provision made for Decedent's mother and made no finding as to whether Decedent's Mother had exerted over him such undue influence as to have resulted in the disinheritance of Appellant. The Circuit Court justified Appellant's disinheritance upon the basis Decedent had sued her for divorce when he made his will but it failed to find a rational basis for the bringing of the divorce action which would justify Appellant's disinheritance. Additionally, it held the federal Acts of 1912 and 1925 constitutional because it

said other cases had so held; however, the cases cited by it revealed no constitutional basis for either the regulation of such property or the deprivation of a spouse of one of Indian blood of her right to share in the distribution of his estate upon his death. The Circuit Court was courteous and considerate but it ignored the balance of Appellant's stated points of appeal including her contention that the Civil Rights Act took precedence over the Acts of 1912 and 1925.

Although *Semple, supra,* had summarized the applicable and settled law pertaining to Osage wills some two decades earlier by his statement heretofore quoted, the Circuit Court disagreed with Semple and the Oklahoma cases, all of which supported his view, by its statement that:

> "Appellant also made the contention that she should be allowed to elect against the will as permitted by 84 Okla. Stat. Ann. 44 and take an intestate share under 84 Okla. Stat. § 213. However, section 7 of the Act of February 27, 1925, 43 Stat. 1008, seemingly prevents appellant from so doing."

but that Appellant might:

> ". . . properly seek to elect against the will under the provisions of Oklahoma law if she can meet the federal requirement of Section 7."

That the thrust of the previous holdings and the specific effect of the holding last quoted is to overturn settled state law appears from the publishing company headnote of *Soderstrom v. Bonner,* 1937, 71 P. 2d 117, which combines the facts and law of that case by saying:

> "Testamentary disposition by competent adult Osage Indian held governed by Oklahoma law prohibiting spouse from bequeathing away from surviving spouse so much of estate that surviving spouse would receive less

in value through succession by law where estate disposed of by will included real estate in Osage County, interest in Osage Indian headrights, and money to testatrix' credit, as restricted Osage Indian, in Treasury of United States (Act. Cong. April 18, 1912 § 8, 37 Stat. 88; 84 Okla. Stat. Ann. § § 44 213, St. 1931 § § 1539, 1617."

Appellant has heretofore showed that Decedent was mentally incompetent when he executed the 1967 instruments; that her disinheritance by such instruments was the product of undue influence exerted over Decedent by his Mother and that there was no justification for her disinheritance by Decedent. In the following sections she will show that the 1925 Act cannot be applied because its primary condition precedent has not been satisfied by proof of Decedent's blood; that if the Act of 1925 is constitutional it has no relation to the will of an Osage decedent bearing the approval of the Secretary of the Interior; that neither the 1912 nor the 1925 Acts are constitutional and that if such Acts are constitutional, the 1925 Act has no relation to the will of an Osage decedent bearing the approval of the Secretary of the Interior; and that if the 1912 and 1925 Acts are constitutional their enforcement is barred by the Civil Rights Acts.

REASONS FOR GRANTING THE WRIT

Since the lower courts have held the 1912 and 1925 Acts possess a constitutional basis and do not violate the sovereign 10th Amendment powers of Oklahoma nor the constitutional rights of Appellant and have held 84 Okla. St. Ann. 44 and 213 repugnant to Section 7 of the Act of Congress of 1925 and have inferentially held the 1912 and 1925 Acts to take precedence over the Civil Rights Acts and have held decedent possessed testamentary capacity, freedom from undue influence, and to have had justification for his disinheritance of

Appellant at the time of his execution of the 1967 will and codicil, and since the lower courts have here decided an important state question in a way in conflict with applicable state law and with a decisionally analogous federal decision and in so doing have decided important questions of federal law which have not been but should be decided by this court, and since other errors herein related have been committed by the lower courts, all of which have had an adverse effect upon the constitutional personal and property rights of the Appellant, Appellant appeals to this court and asks that it hear this appeal without reference to technicality and that it grant to her such relief as she is entitled to receive under the laws of Oklahoma and of the United States.

PROPOSITIONS

(1) WHERE, AS HERE, THE DECEDENT HAS NOT BEEN SHOWN TO HAVE BEEN OF ONE-HALF OR MORE BLOOD OF THE OSAGE TRIBE OF INDIANS, SECTION 7 OF THE ACT OF FEBRUARY 27, 1925, CAN HAVE NO APPLICATION.

By providing that:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians . . ."

the 1925 Act makes proof of the blood of the Decedent a condition precedent to the application of the Act. In this case no proof was ever made as to the blood of the Decedent. It follows that the first headnote of the opinion of the Regional Solicitor should be stricken together with all other findings, rulings, holdings, etc., made herein by the lower courts upon the basis of the blood of the Decedent.

(2) AN APPELLATE COURT REVIEWING AN ADMINISTRATIVE DECISION TO DETERMINE WHETHER THERE IS SUBSTANTIAL EVIDENCE ON THE RECORD TO SUPPORT SUCH DECISION MUST OPENLY WEIGH THE EVIDENCE BY MEANS OF A REASONED OPINION BASED UPON STATED FACT.

5 USCA 706 authorizes an administrative appeal upon the basis of the entire record. The appeal taken by the Appellant to the District Court was specifically taken upon the basis of the entire record (Complaint of Appellant). *Universal Camera Corp. v. National LRB,* 340 U.S. 474, 95 L. Ed. 456, provided that:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."

for:

> ". . . the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report."

Neither the opinion of the District Court nor that of the Circuit Court either openly weighed the evidence or provided any objective indication that either Court had actually examined either the record or the report of the Examiner. A judicial review of an administrative decision to determine the existence of substantial evidence to support such decision has no real meaning where the reviewing court may simply conclude without a showing of the evidence relied upon that the whole record does or does not show the existence of substantial evidence.

(3) THE FEDERAL ACTS OF 1912 AND 1925 ARE UNCONSTITUTIONAL. THERE IS NO CONSTITUTIONAL AUTHORITY FOR THEIR ENACTMENT. THE 1912 ACT ESTABLISHES NO STANDARD FOR WILL APPROVAL WHILE THE 1925 ACT OPENLY DISCRIMINATES AGAINST A PROSCRIBED CLASS UPON THE BASIS OF RACE ALONE. SUCH ACTS VIOLATE THE ANCIENT, MAGNA CHARTA DECLARED, "UNALIENABLE" NINTH AMENDMENT RIGHT OF THE APPELLANT TO SHARE IN THE DISTRIBUTION OF THE ESTATE OF HER HUSBAND WHICH RIGHT IS A MARITAL PROPERTY RIGHT SUBJECT ONLY TO STATE REGULATION. THE FEDERAL ACTS OF 1912 AND 1925 SEEK TO PUNISH APPELLANT FOR HER ACT OF MARRYING A MEMBER OF THE OSAGE TRIBE OF INDIANS. SUCH FEDERAL ACTS CHILL THE EXERCISE OF THE VITAL, PERSONAL, BASIC RIGHT OF THE APPELLANT TO MARRY A PERSON OF HER OWN CHOOSING WHICH RIGHT IS ESSENTIAL TO HER ORDERLY PURSUIT OF HAPPINESS. SUCH ACTS HAVE NO CONSTITUTIONAL PURPOSE AND SERVE NO CONSTITUTIONAL END. THEY ARE GROSSLY OVER-INCLUSIVE UPON THE ONE HAND AND GROSSLY UNDER-INCLUSIVE UPON THE OTHER. THE 1925 ACT IS BASED UPON A CONSTITUTIONALLY IMPERMISSIBLE ASSUMPTION. BOTH ACTS VIOLATE THE BODY OF THE CONSTITUTION AND THE 5TH, 9TH, 10TH AND 14TH AMENDMENTS. THEY RUTHLESSLY AND WITHOUT CONSTITUTIONAL OR MORAL OR RATIONAL BASIS DEPRIVE THE SURVIVING SPOUSE OF AN OSAGE DECEDENT OF THE RIGHT TO SHARE IN HIS PROPERTY. THEY ARE DESTRUCTIVE OF THE FAMILY SYSTEM UPON WHICH OUR GOVERNMENT IS BUILT AND THEIR ENFORCEMENT REPRESENTS

AN ATTACK UPON SUCH SYSTEM. AS THE STATE OF DEATH, RESIDENCE, DOMICILE, CITIZENSHIP AND PROPERTY OF THE DECEDENT THE STATE OF OKLAHOMA ALONE POSSESSES POWER TO REGULATE SUCH RIGHT.

The federal government possesses only such power as is conferred upon it by the federal constitution and may make only such laws as are necessary to the execution of its enumerated powers. *U.S. v. Cruickshank,* 92 U.S. 542, 23 L. Ed. 588; *Linder v. U.S.,* 45 S. Ct. 446, 268 U.S. 5, 69 L. Ed. 817; *Federal Land Bank of St. Paul v. Bismarck Lbr. Co.,* 62 S. Ct. 1, 314 U.S. 95, L. Ed. 65; *Braves v. People of State of N.Y.,* 59 S. Ct. 595, 306 U.S. 466, 83 L. Ed. 927; *R. R. Retirement Bd. v. Alton R. Co.,* D.C. 55 S. Ct. 312, 297 U.S. 1, 80 L. Ed. 477; *Kansas v. Colorado,* 27 S. Ct. 655, 206 U.S. 46, 51 L. Ed. 965; *McCullough v. Maryland,* 4 Wheat 316, 4 L. Ed. 579; *Am. Fed. of Labor v. Watson,* 60 F. Supp. 1010; *U.S. v. Miller,* CCA Mo., 28 F. 2d 846).

It may not transcend such powers though the end seems desirable. (*Linder v. U.S., supra.*)

The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment (*Kansas v. Colorado, supra*) and Congress may not pass laws for the accomplishment of objects not intrusted to it (*Headnote Two, Linder v. U.S., supra*)

The Commerce Clause (Art. 1, Sec. 8, Cl. 3) does not authorize federal control of the devolution of property of

Osage decedents for the devolution of such property is not commerce. No Osage treaty (Art. 6) has ever existed authorizing federal control of such subject and if such treaty once existed it would be a dead letter for there does not exist either a de facto or a de jure Osage Tribe. The Oklahoma Enabling Act of June 16, 1906, does not supply federal authority for such control nor could it for Oklahoma entered the Union by the Ordinance Accepting the Enabling Act of April 22, 1907, and the Proclamation of Statehood of November 16, 1907, each of which declared that Oklahoma entered the Union on an equal footing with the original states, the latter instrument specifically finding that the Oklahoma Constitution "makes no distinction in civil or political rights on account of race or color, and is not repugnant to the *Constitution of the United States* or to the principles of the *Declaration of Independence* . . ." Thus, at statehood, Oklahoma became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states for there is no state whose sovereignty or freedom of action differs from that of another because there are no restrictions imposed upon any state except as are imposed upon all by the Federal Constitution. (*Huse v. Glover*, 7 S.Ct. 413, 119 U.S. 543, 20 L. Ed. 487; 16 CJS 42, c; *Frantz v. Autry*, Okla. 91 P. 193, 12 CJS 725, n. 12; 59 CJS 69, n. 19; *Sands v. Manistee River Imp. Co.*, Mich. 8 S. Ct. 113, 123 U.S. 288, 31 L. Ed. 149; *Dearborn Tp. v. Dail*, 55 N.W. 2d 201, 59 CJS 59, n. 91 (b); 12 CJ, p. 725 n. 12 (A) (L), (30); *Wiswell v. Ross*, 4 Port Ala. 321; *Roberson v. Kennedy*, 1 Stew. 245; 12 CJ p. 725, n. 12 (a) (2); 16 Am. Jur. 2d Const. Law, 201, p. 437).

Congress may not in admitting a state restrict such state by bargain and should it seek to do so the state is not bound by such bargain however irrevocable it is stated to be.

(*Coyle v. Smith*, 221 U.S. 599, 55 L. Ed. 583, 31 S. Ct. 688; *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P. 2d 838, 168 ALR 539, app. dismd. 330 U.S. 803, 91 L. Ed. 1262, 68 S. Ct. 972; *State v. Edmondson*, 98 Ohio St. 93, 105 N.E. 269).

If Congress in admitting a State could restrict such State by bargain, such bargain was not imposed by the Oklahoma Enabling Act in respect to the property of Osage Indians for the Act of Congress of June 28, 1906, 34 Stat. 539, partially superseded the Oklahoma Enabling Act of June 16, 1906, by providing that the devolution of property of Osage Indians should be controlled by the laws of the State of Oklahoma.

The whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States (*Ex parte Burrus*, 136 U.S. 586) for marriage is a social relation subject to the State's police power (*Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817) and the Constitution of the United States does not interfere with the authority of the states over marriages (*Haddock v. Haddock*, 201 U.S. 562). Thus the legislature of each State has the right to declare what interest a husband during the life and after the death of his wife, shall have in her property (*Rieger v. Harrington* (Oregon), 203 P. 576) for the Federal Constitution leaves to each State the power to prescribe the formalities of marriages, to determine the obligations of each spouse to the other, to regulate the disposition of property upon the death of either and to provide that the surviving spouse shall have an interest in the deceased spouse's estate whether he so wills by testamentary act or not (*Labine v. Vincent*, 401 U.S. 532, 28 L. Ed. 288, 91 S. Ct. 1017; *Irving Trust v. Day*, 314 U.S. 398, 86 L. Ed. 452). Statutes giving the widow a right to take against the will of her spouse leaving her less than an intes-

tate share clearly impose a condition such as a State may without restraint from the Federal Constitution annex to the privilege of making a will under its law (*Irving Trust v. Day, supra*).

Laws such as 84 Okla. St. Ann. 44 properly prevent will provisions from cutting off the widow from her state statute fixed share of the estate of her deceased husband (*Labine v. Vincent, supra*) and do not leave open the question whether she has offended her husband whose will must make proper provision for her else such statute makes such provision itself. (*Irving Trust v. Day, supra; Re Greenberg,* 184 N.E. 784).

The holding made herein by the lower courts conflicts with the holding of the Oklahoma Supreme Court made in *Dick v. Reaves,* 1967, 434 P. 2d 296, to the effect that this State may not discriminate upon the basis of race in respect to the devolution of property of decedents.

The right of a surviving spouse to share in the distribution of the estate of her deceased spouse is a natural, 9th Amendment right (*Griswold v. Connecticut,* 381 U.S. 479, 13 L. Ed. 510, 85 S. Ct. 1678) evidenced by the 7th Article of Magna Charta, declared unalienable by the Declaration of Independence, subject to exclusive regulation by the State (10th Amendment) without regard to the race of such deceased or surviving spouse or the similarity or dissimilarity of their race (14th Amendment) *Palmer v. Thompson,* 403 U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940).

Neither the State (14th Amendment) nor the Federal Government (5th Amendment) may discriminate in respect to such right upon the basis of race, for all citizens of the United States are immune from inequality of legal protec-

tion either for life, liberty or property (*Strauder v. W. Va.*, 100 U.S. 303, 25 L. Ed. 664; 5th Amendment; 9th Amendment; 14th Amendment).

Nor may the Federal Government as here enact and enforce federal acts requiring State Government action taken thereon or in respect thereto which action violates equal protection for 5th and 14th Amendments due process is one and the same thing (*Heiner v. Donnan*, 285 U.S. 312, 76 L. Ed. 772) nor may the Federal Government abridge the privileges and immunities of its own citizens or deny to any person within any State life, liberty or property.

Fifth Amendment due process forbids the Federal Government to act in aid of either private or State racial discrimination in a way prohibited the States by the 14th Amendment (*Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884). Nor is the Federal Government constitutionally free to frustrate the only constitutionally permissible State policy of equal protection and due process (*Green v. Kennedy*, USDC, 309 F. Supp. 1127), nor may the Congress authorize the States to violate the equal protection clause (*Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322; *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 534, 91 S. Ct. 1848. Neither government may do that which due process bars the other from doing (*Heiner v. Donnan, supra*). The 14th Amendment applies if State action is but one of several cooperative forces leading to the constitutional violation (Headnote 12, *U.S. v. Guest*, 16 L. Ed. 2d 239). Where the Constitution imposes a prohibition against State action violative of Constitutional rights, no lesser duty exists upon the part of the Federal Government (*Bolling v. Sharp*, 98 L. Ed. 884) which may not frustrate the only constitutionally permissible State policy (*Green v. Kennedy, supra*), nor, regardless of its motive (*Green v. Kennedy, supra*) may the

Federal Government act in a way prohibited the States by the 14th Amendment (*Bolling v. Sharp, supra*) nor may either the State or Federal Government place its power, property or prestige behind discrimination (*Burton v. Wilmington,* 6 L. Ed. 2d 45; *Simpkins v. Moses H. Cone,* 323 F. 2d 959) nor may Federal courts acquiesce in activity of the Federal Government which serves to defeat the State's effort (*Dick v. Reaves, supra*) to secure obedience to the Federal Constitution (*Elkins v. U.S.,* 4 L. Ed. 2d 1669). Discrimination which frustrates the exercise of fundamental liberties is prohibited both the Federal and State Governments (*Green v. Kennedy, supra; Coffey v. State Education Finance, supra*) and such prohibition is not affected by lack of discriminatory motive and good faith (*Burton v. Wilmington Parking Authority, supra*).

The right to choose one's spouse without regard to race is a vital personal, basic civil right residing with the individual, essential to his orderly pursuit of happiness which cannot be infringed by either the general or the State Government. Restricting such freedom by racial classification violates the central meaning of the equal protection clause, (*Loving v. Virginia,* 18 L. Ed. 2d 1017, 388 U.S. 11, 87 S. Ct. 1817; 9th Amendment) which is the same under both the 5th and the 14th Amendments (*Heiner v. Donnan, supra*). The exercise of such freedom cannot be needlessly chilled by the hurdle posed by the Act of 1912 or the punishment imposed by the Act of 1925 (*U.S. v. Jackson,* 390 U.S. 470, 21 L. Ed. 2d 138, 88 S. Ct. 1209) both of which Acts discriminate upon the basis of race contrary to our institutions (*Buchanan v. Warley,* 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16).

The 1925 Act proceeds upon the impermissible assumption that those there prohibited from inheriting from their deceased Osage spouses are more apt to rape and murder

(CCA brief of Intervenors) their Osage Indian spouses than those permitted to inherit under such Act. Moreover, such an Act is both over and under-inclusive and shocks the sense of fair play (*Schneider v. Rusk,* 377 U.S. 163, 12 L. Ed. 2d 218, 84 S. Ct. 1187; *Galvin v. Press,* 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737).

Punishment by or through a state court of either or both participants of a mixed blood marriage by either criminal or economic means whether intended or not deprives the participant or participants thus punished of due process of law in violation of the due process clause of the 14th Amendment (*McLaughlin v. Florida,* 379 U.S. 184, 13 L. Ed. 2d 22, 84 S. Ct. 283; *Pace v. Alabama,* 27 L. Ed. 207; *Loving v. Virginia, supra*) and if, by or through a Federal Court by the 5th Amendment (*Heiner v. Donnan, supra*). Appellant is punished by both Federal and State Government by both the 1912 and 1925 Acts, if such Acts be upheld, only because she married a citizen of part Osage Indian blood.

The Act of 1912 gives to the Interior Secretary power to determine if the testator whose will is offered for his approval was an adult, mentally competent member of the Osage Tribe. If such Act gives to the Secretary power to approve or to disapprove Osage wills upon the basis of the blood of the surviving spouse of the Decedent, which power the Secretary exercised through headnote one of the opinion of his Regional Solicitor, then the power of the Secretary contained in the proviso to the Act is not limited to a determination of the requirements imposed upon the testator in the body of the Act so that such Act must fail not merely because of vagueness but because it wholly fails to limit the authority of the Secretary, thereby substituting the rule of the gavel for the rule of the law.

The Act of 1925 is specific. However, it arbitrarily deprives the members of one group upon the basis of their blood from inheriting from a particular class of Osage decedents while arbitrarily permitting the members of another group upon the basis of their blood to inherit from the same class of such decedents. Arbitrary classifications and classifications based wholly upon blood are unconstitutional for the reason, if no other, that they violate due process which, as this Court has said in *Heiner v. Donnan,* is the same both under the 5th Amendment, which pertains to the Federal Government, and the 14th Amendment, which pertains to the State Government.

In any event, the Acts of 1912 and 1925 are unconstitutional.

(4) WHERE AN INDIAN IS AUTHORIZED BY CONGRESS TO MAKE A WILL IN ACCORDANCE WITH OKLAHOMA LAW, RESTRICTIONS IMPOSED BY SUCH LAW AS TO THE DISINHERITANCE OF A SPOUSE APPLY TO THE WILL OF SUCH INDIAN WITH THE SAME FORCE AS TO WILLS OF OTHER CITIZENS OF SUCH STATE.

The Circuit Court erred in holding contrary to established law that the Act of 1925 barred the operation of 84 Okla. Stat. Ann. 44.

The 1912 Act pertains to testacy only and together with Oklahoma law forms a complete scheme for the testamentary disposition of the property of adult, mentally competent Osage testators whose wills bear the approval of the Secretary of the Interior.

The 1925 Act was passed subsequent to the passage of the 1912 Act. There is nothing in the history of either Act to

indicate that either Act was passed in contemplation of the other.

Each Act forms a separate and distinct and independent scheme for the distribution of the property of Osage decedents, the Act of 1912 governing in the event an Osage decedent dies leaving a will making distribution of his estate and bearing the approval of the Secretary of the Interior, and the Act of 1925 governing in the event an Osage decedent dies leaving no will bearing such approval.

Neither Act is connected to the other by internal reference or otherwise.

Neither Act has any effect upon the operation of the other.

This Court interpreted the language of a somewhat similar, though not decisionally analogous, Five Civilized Tribes Act in *Blundell v. Wallace,* 220 P. 40, (Okla.), 267 U.S. 664, by saying that such Act:

> ". . . left Indian wills subject to the provisions of the law of the state where the Indians were situated; and therefore, an Indian woman could not will more than two-thirds of her property away, if the state law forbade it."

Since 1912, Oklahoma probate courts similarly interpreted the 1912 Act. In 1936, 11 years following the passage of the 1925 Act, the Oklahoma Supreme Court said in *Revard v. Revard,* 63 P. 2d 973, of the 1912 Act that:

> ". . . Congress, in permitting Osage Indians of a certain class to dispose of this class of property by will, has attached the limitation thereon that such disposition shall be in accordance with the laws of the State of Oklahoma.

> "In legislating concerning the testamentary disposition of property by restricted Indians, or the testamentary disposition of restricted property by competent Indians, Congress has frequently imposed certain limitations insuring that his family, or certain members thereof, or certain named close relatives, shall not be omitted. Sometimes, as in section 23 of the Act of Congress of April 26, 1906 (34 Stat. 145), those persons who must be remembered are named. In other acts they are not named, but it is apparent that Congress has adopted the law of wills as it exists in the state where the Indian usually resides. We are of the opinion that there can be little doubt but that Congress in enacting section 8 of the Act of Congress of April 18, 1912 (37 Stat. 86, 88), intended to adopt the general scheme of the statutes of Oklahoma pertaining to wills."

The fourth syllabus shows the holding of the Court as follows:

> "By section 8 of the Act of Congress of April 18, 1912, (37 Stat. 86, 88), a competent Osage Indian may dispose of his Osage headright by will, but in doing so he is bound by the general laws pertaining to wills in Oklahoma and the disposition to those members of his family or relatives or intentional omission thereof, which are set up in said laws."

Revard involved the issue of pretermission and hence could not involve the Act of 1925.

Soderstrom v. Bonner, 1937, 71 P. 2d. 117, however, is squarely and decisionally analogous in law and fact to the law and facts here involved. It involved an Osage decedent of one-half blood and a spouse of no determined blood. It was decided 12 years subsequent to the passage of the 1925 Act. Since Soderstrom is relatively short we have taken the liberty of reproducing it in full at this point for the benefit of the Court.

SODERSTROM et al. v. BONNER*
No. 27167.

Supreme Court of Oklahoma
May 4, 1937.

Rehearing Denied June 8, 1937.

Testatmentary disposition by competent adult Osage Indian *held* governed by Oklahoma law prohibiting spouse from bequeathing away from surviving spouse so much of estate that surviving spouse would receive less in value than through succession by law, notwithstanding testatrix executed will and died in New Mexico, where she was residing and where she owned personal property, where estate disposed of by will including real estate in Osage county, interests in Osage Indian headrights, and money to testatrix' credit, as restricted Osage Indian in Treasury of United States (Act Cong. April 18, 1912, § 8, 37 Stat. 88; 84 Okla. St. Ann. §§ 44, 213, St. 1931, §§1539, 1617).

Syllabus by the Court

An adult member of the Osage Tribe of Indians not mentally incompetent, in the disposition of his property, is bound by the general laws pertaining to wills in Oklahoma, and the disposition to those members of his family or relatives which is provided in said laws. Act Cong. April 18, 1912, § 8, 37 Stat. 88; Sections 1539, 1617, O.S. 1931 (84 Okla. St. Ann. §§ 44, 213).

—o—

Appeal from District Court, Osage County; Jesse J. Worten, Judge.

Proceeding between Floyd Soderstrom, administrator with will annexed of estate of Irene Doris Martin Bonner, deceased, J. I. Howard, guardian ad litem of Beverly Ann Mills, a minor, and Freeman L. Bonner.

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*Writ of certiorari denied 58 S. Ct. 50, 82 L. Ed.

From a judgment permitting Bonner's election to take under the laws of succession rather than by will, the two parties first named appeal.

Affirmed.

Hamilton & Howard, of Pawhuska, for plaintiffs in error.

C. S. Macdonald and F. W. Files, both of Pawhuska, for defendant in error.

PHELPS, Justice.

Irene Doris Martin Bonner was a restricted, unallotted, member of the Osage Tribe of Indians of the one-half blood, owning at the time of her death certain real estate in Osage county, interests in Osage Indian headrights, and certain money to her credit as such restricted Osage Indian in the Treasury of the United States.

In the year 1934, in the State of New Mexico where she was at that time residing, she owned a small amount of personal property, and in that year she made her will and died. Surviving her were her husband, Freeman L. Bonner (defendant in error), and Beverly Ann Mills, a minor, daughter of decedent by a former marriage, whose guardian ad litem is a plaintiff in error.

To the husband she bequeathed her personal property, of negligible value, and to her daughter she devised and bequeathed all of the remainder of her estate, both real and personal, consisting of the property in Osage county. The will was approved by the Secretary of the Interior, and admitted to probate in Osage County.

The surviving husband elected to take under the laws of succession and distribution, instead of the will, and the county court, and the district court on appeal, accordingly decreed him one-half of the estate under the provisions of section 1539, O.S. 1931 (84 Okla. St. Ann. § 44). That section in part provides that no spouse shall bequeath away from the other so much of the estate of

the testator that the other spouse would receive less in value than would be obtained through succession by law. And through succession by law the surviving husband would, under the first subdivision of section 1617, O.S. 1931 (84 Okla. St. Ann. § 213, subd. 1), where only one child survives the deceased spouse, receive one-half of the estate.

The administrator of the estate of the decedent, and the guardian ad litem of Beverly Ann Mills, daughter of decedent, contended in the trial courts and now contend in this court that the provisions of section 8, Act of Congress of April 18, 1912 (37 Stat. 86, 88), permitted the decedent to dispose of her property as she saw fit, and that she was not bound by the provisions of section 1539, O.S. 1931, supra, to leave her husband one-half of her estate. The contention in this respect is supported by authorities construing the various acts of Congress in connection with wills executed by members of the Five Civilized Tribes, holding in substance that where Congress has provided a particular plan of disposition in wills, such provision is exclusive and that the will in such cases is not governed by the laws of Oklahoma. This, however, is an Osage will, and we are governed by section 8, Act of Congress of April 18, 1912 (37 Stat. 86, 88), which reads:

"That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma; Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Since the filing of the briefs in this case, we have decided the question at issue here. In the case of In re Revard's Estate, 178 Okla. 524, 63 P. (2d) 973, we considered this question at length and arrived at the conclusion that Congress, in granting this class and tribe of

Indians the right to dispose of their property by will, by the statute copied, supra, intended that the laws of the State of Oklahoma should govern the disposition provided by said wills. It is unnecessary to again discuss the question at length, as was done in that opinion. By reference to that decision, and particularly that portion of the opinion referred to by paragraph 4 of the syllabus, it is obvious that the judgment should be affirmed.

The judgment is affirmed.

OSBORN, C. J., BAYLESS, V. C. J., and BUSBY, CORN and HURST, JJ., concur.

Thus, Mr. Semple's statement (supra) that:

"THE RESTRICTIONS PLACED BY STATE LAWS UPON A TESTATOR AS TO THE DISINHERITANCE OF A SPOUSE AND CHILDREN APPLY TO AN OSAGE WILL WITH THE SAME FORCE AND EFFECT AS TO ANY OTHER CITIZEN OF THE STATE."

is well borne out by the cases which show such law to have been well settled long prior to the erroneous opinions entered herein by the lower courts.

(5) THE CIVIL RIGHTS ACTS APPLY TO THE FACTS OF THIS CASE AND TAKE PRECEDENCE OVER THE ACTS OF 1912 AND 1925 AND PROTECT APPELLANT'S ENTITLEMENT BOTH IN THE EVENT OF THE DEATH OF HER SPOUSE TESTATE AND IN THE EVENT OF HIS DEATH INTESTATE.

42 USCA 1981 and 1982, et seq, were enacted by the Congress pursuant to authority contained in Section 5 of the 14th Amendment, the former Act originating in the Civil Rights Act of April 1, 1866, and having been re-enacted after the adoption of the 14th Amendment.

Such acts, to the extent that they speak within the limits of the Fourteenth Amendment, speak in execution and definition of such Amendment and take precedence over all other acts relating to the same subject matter but not deriving their authority from such source.

42 USCA 1981 provides that all persons within the jurisdiction of the United States have the same right in every State and Territory to the full and equal benefit of all laws of the security of property while 42 USCA 1982 is more specific and specifically bars the operation of the Act of 1925 by saying that:

> "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Such statutes do not exclude any race or color from the protection which they bestow, (*Walker v. Pointer*, 1969, D.C. Tex., 304 F. Supp. 56; *Cannon v. Action*, 1969, D.C. Mo., 303 F. Supp. 1240; *Central Presbyterian Church v. Black Liberation Front*, 1969, D.C. Mo., 303 F. Supp. 894) their obvious purpose being to provide equality of rights as between persons of different races (*Agnew v. Comtom*, 1956, Ca. 9 Cal., 239 F. 2d. 226 crt. den. 353 U.S. 959, 1 L. Ed. 2d. 910, 77 S. Ct. 868).

CONCLUSION

For the reasons above shown Appellant is entitled to the issuance of a writ of certiorari.

Respectfully submitted,

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and
GEORGE G. BRIGGS
of
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December, 1973
Pawhuska, Oklahoma

APPENDIX A

Exhibit A is the Memorandum dated January 31, 1969 addressed to the Superintendent, Osage Agency, from the Field Solicitor, Pawhuska. Omitting its caption and signatures said Exhibit reads as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
c/o Osage Agency
Pawhuska, Oklahoma 74056

January 31, 1969

Memorandum

To: Superintendent, Osage Agency

From: Field Solicitor, Pawhuska

Subject: Wills of William Bigheart, Jr., Unallotted Osage Indian, dated November 15, 1965, and June 27, 1967, and codicil dated July 7, 1967.

This office has reviewed 228 pages of testimony and 53 exhibits presented in support of and in opposition to the approval of the subject testamentary instruments. As will be outlined hereinafter, it is the conclusion of this office that the will of June 27, 1967, and the codicil of July 7, 1967, should be approved, and that the will of November 15, 1965, should be disapproved.

Mr. Bigheart's restricted estate consisted of the following:

1.54759 Osage headrights valued on date of death at	$ 30,502.98
Cash	13,008.85
Securities	20,000.00
Trust Funds	3,300.20
Interest on Trust Funds	40.80
655 Acres of Real Estate	42,000.00
Total	$108,852.83

Mr. Bigheart's surviving heirs were his wife, Velma Rose Bigheart, the contestant, and two minor children, Randy William and Terril Rae Bigheart. He was also survived by his mother, Mrs. Pearl Hall, who is a named beneficiary. All of the interested parties were represented by counsel, with the minors being represented by a guardian ad litem.

The will of June 27, 1967, bequeathed $100 per month from the headright income to Mrs. Pearl Hall for her lifetime and left the residue and remainder of the estate to the two children. The codicil of July 7, 1967, modified the will of June 27, 1967, to give the mother a cash bequest of $2,500 and the contestant a cash bequest of $10. The will of November 15, 1965, bequeathed to the mother $100 per month for her lifetime and divided the residue and remainder of the estate equally between the contestant and the two children. Based on Mrs. Hall's life expectancy at age 66, the two bequests to her have a total value of approximately $15,148.

Contestant asserted every conceivable objection to the approval or probate of a testamentary instrument. These include lack of due execution, lack of testamentary capacity, undue influence, unnaturalness of the will, etc. Contestant

asserts that the will of June 27, 1967 should not be approved as the surviving wife is not named as a beneficiary or devisee and that the codicil of July 7, 1967, should not be approved as it was procured by undue influence on the part of the sole beneficiary, Mrs. Pearl Hall.

Contestant also asserts that the portion of the will of November 15, 1965, which benefits Mrs. Pearl Hall should be disapproved, and the balance of the will which left the remainder of the estate to the two children and the contestant should be approved.

Both wills and the codicil were executed in the law offices of McCoy, Kelly & Gambill or Kelly & Gambill, the successor firm. The testimony of the several subscribing witnesses indicates that the testator knew he was executing a will and was oriented at the time. The wills and the codicil all appear to have been properly executed and the signatures of testator are clear and firm.

Contestant relies on the testimony and exhibits, some of which were not admitted, which tend to prove that testator's mother interfered with his marriages, encouraged his drinking habits, and unduly influenced his testamentary efforts. Assuming, however, that if all of such evidence were admitted, it would still be my finding that the influence of the mother was not such as to invalidate either of the wills or the codicil. The Supreme Court of Oklahoma in *Wheeler v. Wade,* 172 Okla. 365, 45 P. 2d 66, 69 (1935), defined the undue influence required to invalidate a will as follows:

> "Undue influence such as will invalidate a will must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator."

The evidence indicates that Mrs. Hall was concerned with the several marriages of her son and on occasions corresponded with the Osage Agency concerning a divorce and the employment of an attorney. Such action on the part of the mother might constitute a cause of action, but does not provide a valid basis for finding the loss of free agency which contestant had to prove. There is no evidence that Mrs. Hall in any way interfered with the son's first marriage, although there is a statement on page 4 of Contestant's Exhibit 24 which indicates that testator advised doctors that he did not care to terminate either of his first two marriages. As to the fourth marriage, the evidence strongly reflects that neither testator nor the contestant were able to find satisfactory marriage partners as it was testator's fourth marriage and the seventh for contestant. The evidence further reflects that in spite of the fact contestant maintained a good, clean, neat home in which meals were prepared regularly, her own witness, Mrs. Sadie Bigheart, testified that testator would rather drink than eat. (Tr. 110) Also, contestant's witness, Mrs. Bobbie Jean Oberly, testified that contestant did not let testator drink in the home. (Tr. 79) Furthermore, the evidence of a satisfactory homelife is not indicated by the statement of Mrs. Sadie Bigheart to the effect that testator in May of 1967 was running around with Indian girls. (Tr. 111)

The evidence further reveals that during the period contestant and testator resided in Pawhuska, Contestant's Exhibits 5, 6, and 7, testator was charged with public drunkenness and arrested on at least 10 occasions. It is not difficult to conclude that testator would prefer to return to a home where he could find sanctuary from the police than to one in which he was not welcome when intoxicated and in which he could not imbide.

Another consideration of this mother and son conflict would require a finding that the mother's dominating personality so subjugated the son that when he was not in her presence or even closely associated with her he had no free agency. Contestant asserts that Mrs. Hall's influence premeated not only the last will and codicil, but also the will of November 15, 1965. Insofar as I can determine from the record, Mrs. Hall did not move to Pawhuska until the spring of 1967, and testator was living with contestant in Pawhuska when the 1965 will was prepared and executed. Contestant was present in the attorneys' office when the will was prepared. The mother was almost a thousand miles removed, yet contestant would have us conclude that the bequest to the mother was the result of undue influence. The bequests to the mother in the 1965 and 1967 wills are identical.

Contestant's burden of providing undue influence is an extremely difficult one and it is recognized that circumstantial evidence would be sufficient. The facts of this case, however, do not readily submit themselves to the inference that the mother's influence destroyed the free agency of the testator or that the influence that may have been exerted was necessarily undue influence. An example of this is the attempted suicide of testator which is mentioned in some of the medical reports and which is referred to in Mrs. Hall's testimony when she related that testator attempted suicide because she would not take him to town. (Tr. 43) This was no doubt a dramatic experience in their lives, but from the evidence offered, it is impossible to infer that it resulted from the undue influence of the mother as testator may have been making some demand upon her which she considered unreasonable. The evidence reflects that Mrs. Hall was probably dealing with an individual with a serious character and alcoholism problem from the

time testator completed his second tour of duty in the armed forces. (Contestant's Exhibit 21, p. 13)

In addition to an attempted suicide and the bequest in the 1965 will, the records contain other evidence, both pro and con, on the question of influence. The mother's correspondence with the Agency would indicate that she may have attempted to prevent at least one marriage, yet it was consummated. The mother and both of testator's children were opposed to the sale of the ranch in South Dakota, yet the sale was consummated; in fact, the deed was executed four days prior to the execution of the codicil which contestant would have us believe was purely and wholly the result of the mother's domination and in which there was an absence of any free agency on the part of the testator.

One of the factors that may be considered in determining whether undue influence was present in the execution of a testamentary instrument is the unnaturalness of a bequest. The bequest to Mrs. Hall, who has apparently always been more or less dependent upon the testator, is nominal in view of the size of the estate and her close association with testator throughout his life.

It is my finding, based on hearing the evidence and reviewing the transcript and briefs, that the will of June 27, 1967, and the codicil of July 7, 1967, were both duly executed in accordance with the laws of the State of Oklahoma, that at the time of execution testator had testamentary capacity, and that neither of said instruments was the product of undue influence such as would destroy the free agency of the testator. It is further found that testator was not subjected to the influence of drugs, alcohol, or combination thereof at the time the instruments were executed as would destroy testamentary capacity, that the involvement

of the mother in testator's affairs was not such undue influence as would invalidate a testamentary instrument, and that the bequests to the mother are not unnatural. It is, therefore, recommended that you approve the will of June 27, 1967, and the codicil of July 7, 1967, and that, because of the revocation clause in the will of June 27, 1967, you disapprove the will of November 15, 1965.

APPENDIX B

Exhibit B is the letter decision of the Superintendent of the Osage Indian Agency. Omitting the names and addresses and the advisory section as to appellate rights, such exhibit reads as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
OSAGE AGENCY
PAWHUSKA, OKLAHOMA 74056

This is to advise that the last will and testament of William Bigheart, Jr., unallotted Osage Indian, deceased, dated June 27, 1967, and codicil dated July 7, 1967, were approved by this office on February 13, 1969, and the will of November 15, 1965, was disapproved, all pursuant to the Act of April 18, 1912, 37 Stat. 86, and 25 CFR 17. This office concluded that the will of June 27, 1967, and the codicil of July 7, 1967, were executed in accordance with the laws of the State of Oklahoma and that at the time of execution, Mr. Bigheart had testamentary capacity, and that neither of said instruments was the product of undue influence such as would destroy the free agency of the testator. It was further concluded that the testator was not subjected to the influence of drugs, alcohol, or a combination thereof at the time the instruments were executed to the extent that testamentary capacity would be destroyed, that the involvement of testator's mother in his affairs was not such undue influence as would invalidate a testamentary instrument, and that the bequests to his mother were not unnatural.

APPENDIX C

Exhibit C is the decision of the Regional Solicitor dated August 8, 1969. Omitting the Department distribution section it is reproduced in its entirety as follows:

ESTATE OF WILLIAM BIGHEART, JR.

Decided: August 8, 1969

IA-T-21

Statutory Construction: Administrative Construction
Indian Lands: Descent and Distribution: Wills
Indians: Probate

The Superintendent, Osage Agency, has the authority and jurisdiction to approve the will of an Osage Indian disinheriting the spouse of such Indian where such spouse fails to prove her Indian heritage in accordance with the Act of February 27, 1925, ch. 359, § 7, 43 Stat. 1011, and the Act of September 1, 1950, ch. 832, 64 Stat. 572.

Regulations: Interpretation
Indians: Probate

The interested parties in the estate of a deceased Osage Indian are not, as a matter of right, entitled to review the recommendation of the Field Solicitor made pursuant to 25 CFR 17.10 prior to the Superintendent approving or disapproving the will of the deceased.

Indian Lands: Descent and Distribution: Wills
Rules of Practice: Evidence

Evidence that a decedent was a chronic alcoholic, but which fails to establish that the decedent had suffered damage to his brain to the degree that his memory or

ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the decedent.

Indian Lands: Descent and Distribution: Wills

Rules of Practice: Evidence

Evidence that the marital relations between the decedent and his spouse had deteriorated and that they were estranged at the time he executed a will disinheriting such spouse is sufficient to support a finding that such will makes a natural disposition of the estate of the decedent as to such spouse.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
TULSA REGION
P. O. Box 3156
TULSA, OKLAHOMA 74101

August 8, 1969

IA-T-21

	:	Appeal from action of the
Estate of William Bigheart, Jr.,	:	Superintendent of the
deceased Osage Unallottee	:	Osage Agency approving
	:	a will
	:	Affirmed

APPEAL FROM THE
SUPERINTENDENT OF THE OSAGE AGENCY

The appellant, Velma Bigheart, wife of William Bigheart, Jr., deceased unallotted half blood Osage Indian who had

not received a certificate of competency, appeals from the order of the Superintendent of the Osage Agency, Pawhuska, dated February 13, 1969, approving the last will of the decedent dated June 27, 1967, and a codicil thereto dated July 7, 1967. The appellees are the mother of the decedent and two minor children of the decedent by a prior marriage.

The decedent died on September 29, 1967, at the age of 42 years. For the last 15 years of his life he suffered from alcoholism. He and the appellant were married in September 1965 in the State of Nebraska, and soon thereafter moved to Pawhuska, Oklahoma. On November 15, 1965, in Pawhuska, the decedent, in the presence of the appellant, executed a will devising to his mother a life annuity of $100 a month, and the balance of his estate to the appellant and his two minor children by his first wife.

In June 1967, the decedent and the appellant became estranged and the decedent left the appellant and went to live with his mother, who had recently moved to Pawhuska from South Dakota. Thereafter, on June 26, 1967, the scrivener of the 1967 will and codicil visited the decedent in his mother's home and discussed the terms of a new will with him. The next day the decedent went to the office of the scrivener and there reviewed the new will and also a Petition for Divorce to be filed on his behalf against the appellant. The decedent was then driven by the scrivener and his secretary to the offices of the Tolson Agency, and there the will dated June 27, 1967, was executed in the presence of the attesting witnesses, the scrivener and Mr. Tolson. The attesting witnesses also executed a self-proving clause which was acknowledged by Mr. Tolson, a notary public. By the terms of this will the decedent devised to his mother a life annuity of $100 a month and the balance of his estate to his two minor children, and specifically revoked

all previous wills. On July 7, 1967, the decedent returned to the office of the scrivener and executed a codicil to the 1967 will, devising to his mother, in addition to her life annuity, the sum of $2,500, and to the appellant the sum of $10.

The appellant presented the 1965 will to the Superintendent for approval. Thereafter, when the appellees presented the 1967 will and codicil for approval, the appellant requested that the devise of a life annuity to the mother of the decedent by the 1965 will be disapproved as being the result of undue influence imposed upon the decedent by his mother.

In accordance with the provisions of the regulations issued by the Secretary of the Interior[1], hearings were held by the Field Solicitor at which the appellant and the appellees were present and represented by counsel, and testimony and exhibits were received into evidence. At the conclusion of said hearings, and after the parties had been furnished a transcript of all testimony and copies of all exhibits, they each submitted briefs to the Field Solicitor setting forth their respective contentions. The Field Solicitor then submitted to the Superintendent the entire record of the hearing together with a memorandum recommending approval of the 1967 will and codicil. The Superintendent, on February 13, 1969, placed his stamp of approval on the Field Solicitor's memorandum and adopted it as his findings of fact and conclusions of law. On February 14, 1969, the Superintendent mailed to all interested parties and their attorneys written notice that he approved the 1967 will and codicil and disapproved the 1965 will, and advised them of their right to appeal.

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[1]25 CFR 17.1-17.14.

On February 24, 1969, the appellant filed with the Superintendent a Notice of Intent to Appeal, and an Objection To Decision and Request For Suspension Of Decision, alleging that the Federal Government did not have jurisdiction, that neither the Department of the Interior nor the Superintendent had authority to approve a will of an Osage Indian disinheriting his spouse, and that the appellant had been denied due process of law in that she was not given an opportunity to object to the recommendations of the Field Solicitor, and further that the decision of the Superintendent was not supported by the findings of fact and conclusions of law contained in the recommendations of the Field Solicitor which the Superintendent adopted.

On March 11, 1969, the appellant filed with this office a Motion For Remand Of Decision To Superintendent Of The Osage Indian Agency To Require Statement Of Reasons Or Basis For Findings And Conclusions, together with an Objection To Review By Regional Solicitor. The basis for the motion for remand is that the Field Solicitor did not make specific findings of fact as to certain evidence. Upon being advised that no ruling would be made on any of the aforesaid motions until and unless an appeal was filed pursuant to the provisions of 25 CFR 17.14, the appellant filed an appeal setting forth 34 separate grounds for reversal of the order of the Superintendent approving the 1967 will and codicil, which appeal incorporated all of the above allegations, and further alleged that the decedent did not have the requisite testamentary capacity when executing the 1967 will and codicil, that said instruments were unnatural in that they disinherited the appellant as the surviving spouse, and that such instruments were the result of the undue influence of decedent's mother.

The allegations by the appellant that the Federal Gov-

ernment, Department of the Interior, Superintendent, and the Regional Solicitor do not have jurisdiction to approve the will of an Osage Indian which disinherits his spouse is without merit. The Federal Government has plenary power over the restricted property of Indians[2], and in the exercise of such power Congress enacted the Act of April 18, 1912, ch. 83, 37 Stat. 86. Section 8 of this Act grants to Osage Indians the right to dispose of their restricted property by will in accordance with the laws of Oklahoma subject only to the approval of the Secretary of the Interior[3]. Pursuant to his authority to delegate his responsibilities[4], the Secretary delegated to the Superintendent the responsibility and authority to approve the wills of Osage Indians[5], and by regulation provided that appeals from the decisions of the Superintendent approving or disapproving such wills should be to the Solicitor[6]. The Solicitor, in turn, delegated his

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[2]*Blanset v. Cardin*, 256 U.S. 319 (1921); *LaMotte v. United States*, 254 U.S. 570 (1921); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[3]Act of April 18, 1912, ch. 83, § 8, 37 Stat. 86: "That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

[4]5 U.S.C. 301 (Supp. IV, 1969); The Reorganization Plan No. 3 of 1950, 64 Stat. 1262.

[5]25 CFR 17.1-17.14.

[6]210 DM 2.2A(3) (a), (24 F.R. 1348).

responsibility and authority to the Regional Solicitor[7]. Therefore, the Superintendent had the authority and jurisdiction to approve the 1967 will and codicil of the decedent, and the fact that such instruments do not comply with the requirements of Okla. Stat. tit. 84, § 44 (1961)[8] is immaterial, the appellant having failed to introduce any evidence that she is of Indian heritage in accordance with Section 7 of the Act of February 27, 1925, ch. 359, 43 Stat. 1011[9], as amended by the Act of September 1, 1950, ch. 832, 64 Stat. 572[10].

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[7]Solicitor's Regulation 23 (31 F.R. 4631); *Estate of Edward Leon Petsemoie*, IA-T-10 (Supp.) (May 29, 1968).

[8]Okla. Stat. tit. 84, § 44 (1961): "Every estate in property may be disposed of by will; provided however, that a will shall be subservient to any antenuptial marriage contract in writing; but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law; provided, however, that of the property not acquired by joint industry during coverture the testator be not required to devise or bequeath more than one half thereof in value to the surviving spouse; provided further, that no person shall by will dispose of property which could not be by the testator alienated, encumbered or conveyed while living, except that the homestead may be devised by one spouse to the other."

[9]Act of February 27, 1925, ch. 359, § 7, 43 Stat. 1011: "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided*, That this section shall not apply to spouses under existing marriages."

[10]Act of September 1, 1950, ch. 832, 64 Stat. 572: "That section 7 of the Act of February 27, 1925 (43 Stat. 1008,

It is alleged by the appellant that the Superintendent erred in not setting forth a definition of naturalness of disposition, or testamentary capacity, and that the definition of undue influence used by the Superintendent[11] is improper as placing too great a burden of proof on the appellant. In addition, she alleges that the Superintendent erred in not making specific findings of fact with respect to certain portions of the evidence, and that she was denied due process of law in that she was not given an opportunity to object to the recommendations submitted by the Field Solicitor to the Superintendent. Such allegations are without merit.

The Act of 1912, *supra*, does not require that hearings be held. Neither such act nor the Secretary's regulations

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1011), which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section after the comma following the word 'Provided' and inserting in lieu thereof the following: 'That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. Provided further, That this section shall not apply to spouses under marriages existing on February 27, 1925'." See also *Mashunkashey v. Mashunkeshey*, 134 P. 2d 976 (1942); *Wash-sha-she-me-Tsa-he's Estate*, 239 P. 177 (1925).

[11]"Undue influence such as will invalidate a will must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator."

prescribe the form, format, or contents of the Superintendent's decision or require that the parties be given an opportunity to review the recommendations of the Field Solicitor prior to the decision of the Superintendent.[12] Furthermore, the definition of undue influence used by the Superintendent is in conformity with accepted requirements for proof.[13]

The balance of the allegations contained in the appellant's appeal relate to the validity of the 1967 will and codicil, and in substance allege that the decedent did not then possess testamentary capacity and that the will and codicil are the product of undue influence exercised by his mother. In support of such allegations, the appellant relies primarily upon evidence that the decedent was a chronic alcoholic and that such instruments are unnatural in disinheriting his spouse.

The evidence that the decedent was a chronic alcoholic and user of drugs fails to establish that he had suffered damage to his brain to a degree which would affect his memory or ability to reason. Likewise, such evidence is insufficient to indicate that he was under the influence of alcohol or drugs at the time of making the 1967 will or the codicil thereto. The fact that he was driven approximately 150 feet from the office of the scrivener to the offices of the Tolson Agency where he executed the 1967 will is insufficient to sustain an inference that he might have been intoxicated, particularly in view of the testimony of the attesting witnesses that the decedent was sober and specifically asked

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[12]*LaRue v. Udall*, 324 F. 2d 428 (Cir. 10) (1963).

[13]*Estate of Myron Bangs, Jr.*, IA-1327 (February 7, 1966).

them to witness his will, and the evidence that the decedent had an old leg injury which made it difficult for him to walk without a cane.

The naturalness of disposition under a will is determined by examining the relationship existing at the time of its execution between the decedent, his heirs and devisees.[14] Here, the evidence that the marital relations between the decedent and the appellant had deteriorated and that they were estranged rebuts the contention of the appellant that the 1967 testamentary instruments are unnatural in disinheriting her as the spouse of the decedent. As previously noted, a short time before making the 1967 will the decedent left the home of the appellant and went to live with his mother, and at the time of executing said will he also acknowledged a petition for divorce from the appellant. Therefore, the finding and conclusion by the Superintendent that the 1967 testamentary instruments provide a natural disposition of the estate of the decedent must be affirmed. Since the evidence that the decedent was a chronic alcoholic is insufficient to rebut the testimony of the attesting witnesses, and since, in light of the relationship which then existed, the 1967 testamentary instruments provide for a natural disposition of the estate of the decedent, it follows that the decision of the Superintendent that the decedent had testamentary capacity must also be affirmed.[15]

The allegation by the appellant that the 1967 testamentary instruments are the product of undue influence exer-

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[14]*Estate of Edward Leon Petsemoie,* IA-T-10 (April 29, 1968).

[15]*Estate of Francis Wheeler,* IA-1191 (July 24, 1964); *Estate of Myron Bangs, Jr., supra.*

cised by the mother on the decedent is without merit. The 1965 will submitted by the appellant to the Superintendent for approval contains a provision for his mother identical with that contained in the 1967 will. At the time the 1965 will was executed in Pawhuska, Oklahoma, the appellant was present, but the mother of the decedent was still living in South Dakota. Moreover, it is noted that the appellant sought to have the provisions of the 1965 will granting the mother a lifetime annuity declared invalid as being the product of undue influence only after the appellees presented the 1967 will for approval.

Although there is evidence that the mother of the decedent did provide him with alcohol, there is also evidence that she constantly encouraged and assisted the decedent in obtaining medical attention for his alcoholism. The evidence that the decedent married three times and sold his ranch in South Dakota, all over the objections of his mother, indicate that she could not and did not completely dominate his life. Furthermore, in view of the size of the estate of the decedent, the devise to his mother by his will and codicil is not excessive or unnatural, for the decedent had always provided for her welfare. Accordingly, the Superintendent's decision of February 13, 1969, that the decedent was not unduly influenced by his mother in the making of the 1967 will and codicil must be affirmed.

We have carefully reviewed and considered the entire record before us, including the pleadings and briefs, and on the basis thereof conclude that the Superintendent did not commit error in approving the 1967 will and codicil of the decedent and disapproving the 1965 will.

Accordingly, pursuant to authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(3)(a), 24 F.R. 1348), and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), the decision of the Superintendent dated February 13, 1969, approving the will of the decedent dated June 27, 1967, and a codicil thereto dated July 7, 1967, and disapproving a will of the decedent dated November 15, 1965, is affirmed, and all motions and objections heretofore filed by the appellant are overruled and denied.

RAYMOND F. SANFORD
Regional Solicitor

APPENDIX D

Exhibit D is the order entered herein by the District Court. Omitting only its description of the parties, it reads as follows:

FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER OVERRULING PLAINTIFF'S OBJECTIONS TO RECOMMENDATION OF THE MAGISTRATE; ORDER OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; ORDER SUSTAINING INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

The Court has for consideration the plaintiff's motion for summary judgment; the intervenors' motion for summary judgment; the objections of plaintiff to the recommendation of the United States Magistrate; the briefs in support and opposition thereto, the transcript of the administrative proceedings, and having carefully perused the entire file, being fully advised in the premises, the Court makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The deceased, William Bigheart, Jr., died on or about September 29, 1967, and at the time of his death he was married to Velma Rose Bigheart, a white woman, plaintiff in the instant litigation. The parties were married at Chadron, Nebraska, on or about August 17, 1965.

2. At the time of death there was found in the papers of the deceased a will bearing the date of November 15, 1965. Under the terms of this will the mother of the deceased, Mrs. Pearl Hall, was to receive from the estate of the deceased $100.00 per month during her lifetime; the

residue after expenses was bequeathed ⅓ to Velma Rose Bigheart, plaintiff; ⅓ to Terrill Rea Bigheart; ⅓ to Randy Bigheart. The last two named beneficiaries were minor children of the deceased by his first wife.

3. There was also found in the effects of the deceased a will dated June 27, 1967, which is the will that is the subject matter of this litigation. Under the terms of this will, the deceased bequeathed $100.00 per month to his mother, Mrs. Pearl Hall, for life, and the residue of the estate, after taxes and expenses, was left in equal shares to the two minor children, Terril Rea Bigheart and Randy Bigheart. Velma Wilson Bigheart, the surviving wife of the deceased and plaintiff in the instant litigation, was deleted in this will.

4. Also in the effects of the deceased was a codicil to the will, described in paragraph 3 above, dated July 7, 1967. In this codicil the deceased bequeathed to his mother, Mrs. Pearl Hall, $2500.00; Velma Wilson Bigheart, plaintiff, was bequeathed the sum of $10.00. The residue of said estate, after taxes and expenses, was left in equal shares to Terril Rea Bigheart and Randy Bigheart.

5. The complaint in this litigation was for a review of the findings of the Secretary of the Interior, resulting from a hearing to determine the validity of the will bearing the date of June 27, 1967, and the codicil thereto, bearing date of July 7, 1967.

6. In accordance with the regulations issued by the Secretary of the Interior (25 C.F.R. 17.1 and 17.14) hearings were held by the Superintendent of the Osage Indian Agency at Pawhuska, Oklahoma, and at the conclusion of the hearings, and, after the parties concerned had an opportunity to submit briefs, the Superintendent made a finding

approving the will bearing the date of June 27, 1967, and the codicil thereto, bearing the date of July 7, 1967.

7. The plaintiff, by proper notice and pleading, appealed the findings of the Superintendent of the Osage Indian Agency to the Regional Solicitor's Office, and, after due consideration, the Solicitor affirmed the findings of the Superintendent of the Osage Indian Agency, determining that the will of the deceased dated June 27, 1967, and the codicil to said will dated July 7, 1967, were valid instruments, executed according to the Statutes of the State of Oklahoma, and that the deceased had testamentary capacity at the time said instruments were executed and witnessed.

8. The pleadings, briefs, and transcript of the administrative proceedings, clearly establish that the deceased, William Bigheart, Jr., was competent at the time he executed the will and the codicil which are the subject of this action and that the deceased was possessed of testamentary capacity at the time both of said instruments were executed and witnessed.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court makes the following Conclusions of Law.

1. This Court has jurisdiction of the subject matter and the parties to this litigation.

2. The Secretary's authority to delegate matters of this nature are contained in the Act of Congress of May 29, 1950, 15 F.R. 3174, 64 Stat. 1262, as Amended July 5, 1952, 66 Stat. 121.

3. The record in this case clearly confirms the findings of the Superintendent of the Osage Indian Agency and the affirmation of those findings by the Regional Solicitor. The will of June 27, 1967, and the codicil of July 7, 1967, were valid in all respects and fully conformed to the Oklahoma statutory requirements as to execution and publication.

4. It appears from the file that the complaint, together with all motions and briefs, constitute an attempt on the part of plaintiff to attack the constitutionaliy of the Act of 1912, 37 Stat. 86, the Act of 1925, 43 Stat. 1011 and the Amendment of 1950, 64 Stat. 572.

5. Section 8 of the Act of 1912 provides, in part, as follows:

> "That any adult member of the Osage Indian Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed by will, in accordance with the laws of the State of Oklahoma: provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

6. Section 7 of the Act of Congress of February 27, 1925, provides as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title or interest to any restricted lands, monies or mineral interests of the Osage Tribe; provided that this section shall not apply to spouses under existing marriages."

7. There is no relevant authority in any of the briefs filed by plaintiff herein that would sustain the position of the Osage Indian Agency or the affirmation of the Superintendent's findings by the Regional Solicitor that could result in invalidating those findings.

8. The references that plaintiff makes to the Magna Carta, the Declaration of Independence and the Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution are frivolous and need no comment.

9. The record in this case, in its present posture, reflects that there is no genuine issue as to any material fact and summary judgment will lie in favor of the intervenors.

ORDER

IT IS, THEREFORE, ORDERED that plaintiff's motion for summary judgment be and the same is hereby overruled.

IT IS FURTHER ORDERED that intervenors' motion for summary judgment be and the same is hereby sustained.

IT IS FURTHER ORDERED that plaintiff's objections to recommendations of the United States Magistrate be and the same are hereby overruled.

ENTERED this 31st day of July, 1972.

ALLEN E. BARROW
Chief United States District Judge

APPENDIX E

Exhibit E is the judgment of the Tenth Circuit Court of Appeals of August 14, 1973. Omitting only its description of the parties it reads as follows:

Before SETH, BARRETT, and DOYLE, *Circuit Judges.*

SETH, *Circuit Judge.*

Appellant, Velma Rose Bigheart, appeals from an order of the district court approving the administrative determination of the Department of the Interior that the 1967 will and codicil of William Bigheart, Jr. were valid and effective. William Bigheart, Jr. was a half blood Osage Indian, and appellant is decedent's widow. The decedent died on September 27, 1969, possessed of certain restricted property, and left surviving the appellant, two children by a former marriage, and his mother.

Appellant and decedent were married in 1965. Both had been married several times previously and had known each other for some time. Decedent had a serious drinking problem and had been hospitalized many times. After their marriage, appellant and decedent moved to Oklahoma from South Dakota where they had been residing. Decedent owned a ranch in South Dakota on which his mother and her husband lived. Since decedent was an unallotted Osage, without a certificate of competence, all property of decedent was held in trust by the United States. Upon their arrival in Oklahoma, decedent contacted the Osage Indian Agency and requested that his South Dakota property be sold so that

he might buy a house in Pawhuska, Oklahoma. There was evidence in the record that this was done. Decedent's medical problems continued, and shortly after his arrival in Pawhuska, decedent contacted his attorneys and drew a new will, cancelling his old will and the codicils thereto. This will was executed in 1965 and will hereinafter be termed the 1965 will. However, the record shows that decedent continued to drink heavily. There was evidence that appellant would not allow decedent to drink while at home. After the sale of the South Dakota ranch, decedent's mother and her husband came to live in Pawhuska. Sometime in the late spring or early summer of 1967, decedent went to live with his mother. On the 27th day of June, 1967, decedent executed a new will which completely omitted his wife, appellant herein. On the same day he filed for divorce. On July 7, 1967, on his way to have a gall bladder operation, decedent executed a codicil to the June 27th will, leaving $10.00 to appellant.

After his death, the Osage Indian Agency commenced Will Approval hearings in accordance with regulations of the Department of the Interior. Appellant contested the 1967 will and codicil thereto on the grounds that decedent did not have testamentary capacity in 1967 and that he was under the domination of his mother at that time. Decedent's 1965 will left his mother $100.00 a month for life payable from decedent's Osage headrights, with the remainder of his estate to be divided into thirds, one for his wife, appellant, and one for each of his two children. The 1967 will also left his mother $100.00 a month for her life, but provided that the remainder of his estate should be divided equally between his two children. The 1967 codicil left $10.00 to appellant and granted the additional sum of $2,500.00 to decedent's mother.

After extensive hearings on testamentary capacity, the Field Solicitor determined that the 1967 will and codicil should be approved, and that the 1965 will had been superseded and should not be approved. His recommendations were forwarded to the Superintendent of the Osage Agency and were adopted. Appellant made exhaustive administrative appeals which were all determined adversely to her. The 1967 will was then sent to be probated in the Courts of Oklahoma. This suit was filed, and the probate proceedings were stayed pending the outcome of this action.

After an examination of the record of the administrative hearings, we are convinced that the trial court was correct in its determination that the decision of the Agency was supported by substantial evidence on the record as a whole. Appellant attempted to show that the 1965 will was proper, and that the 1967 will was executed under the influence of decedent's mother. However, it will be noted that the provisions for decedent's mother in the 1967 will and codicil thereto do not differ substantially from those in the 1965 will. The only substantial difference between the two wills was the inclusion of appellant in the former, and her almost total exclusion from the latter. In light of the fact that decedent had commenced divorce proceedings against appellant, we do not find that to be unusual. We also hold that there was substantial evidence on the record as a whole to support the determination that decedent had testamentary capacity when he executed the 1967 will and codicil and revoked the 1965 will.

Appellant also made the contention that she should be allowed to elect against the will as permitted by 84 Okla. Stat. Ann. § 44, and take an intestate share under 84 Okla. Stat. Ann. § 213. However, section 7 of the Act of February 27, 1925, 43 Stat. 1008, seemingly prevents appellant from

so doing. That section as amended September 1, 1950, provides as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe; Provided, That (except in cases where a person claiming as such heir is a party to a judicial proceeding pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. . . ."

Appellant alleges first, that this Act is unconstitutional, and secondly, that she has not been given notice and an opportunity to show that she is of Indian blood, and enrolled or the lineal descendant of someone enrolled on a tribal roll or census. On the first point, appellant sought to have the question determined by a three-judge panel. 28 U.S.C. § 2284.

The trial court determined, and properly so, that the constitutionality of section 7 of the Act of 1925, although not having been explicitly ruled upon, had been upheld in other situations almost identical hereto, and that it was therefore not necessary to convene a three-judge court. That Congress can regulate as to inheritance of restricted Indian properties and that this classification, although based on race, is permissible, has been determined in many cases. See *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808, aff'd 384

U.S. 209; *Blanset v. Cardin*, 256 U.S. 319; *Ute Indian Tribe of Uintah & Ouray Reservation v. Probst*, 428 F. 2d 491, rehearing denied 428 F. 2d 498 (10th Cir.); *Groundhog v. Keeler*, 442 F. 2d 674 (10th Cir.).

As for appellant's contention that she was not given notice and an opportunity to be heard on the question of whether or not she was of Indian blood and met the requirements of section 7 of the Act of February 27, 1925, we hold that appellant's counsel properly reserved that issue for presentation to the County Court of Osage County, Oklahoma, where the will had been filed for probate. It was the function of the Department of the Interior to approve or disapprove decedent's will. This having been done, appellant can properly seek to elect against the will under the provisions of Oklahoma law if she can meet the federal requirements of section 7. Oklahoma courts have consistently followed this procedure. See *Ware v. Beach*, 322 P. 2d 635 (Okla. 1957); *Mashunkashey v. Mashunkashey*, 134 P. 2d 976 (Okla. 1942); *In re Smith's Estate*, 107 P. 2d 188 (Okla. 1940); *In re Martin's Estate*, 80 P. 2d 561 (Okla. 1938); see also *Tiger v. Timmons*, 295 P. 614 (Okla. 1931).

The cases cited by appellant in support of her position that she should be allowed to elect against the will and take an intestate share according to the laws of the State of Oklahoma regardless of whether she is of Indian blood do not support her position. In re *Mo-se-che-he's Estate*, 107 P. 2d 999 (Okla. 1940), although holding that the laws of the State of Oklahoma were applicable to the wills of Osage Indians, the Court made the following statement, at 1004:

> "Plaintiffs in error contend that Jack Rogers (Albert Fierro) is not a competent person to protest the will for the reason that he has not shown

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Appellant alleges first, that this Act is unconstitutional, and secondly, that she has not been given notice and an opportunity to show that she is of Indian blood, and enrolled or the lineal descendant of someone enrolled on a tribal roll or census. On the first point, appellant sought to have the question determined by a three-judge panel. 28 U.S.C. § 2284.

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CERTIFICATE OF MAILING

I certify that on January 2, 1971, I mailed 40 copies of the petition for certiorari to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, D. C.; delivered two copies thereof to Kelly & Gambill, Attorneys at Law, Pawhuska, Oklahoma, and to Kane & Kane, Attorneys at Law, Pawhuska, Oklahoma, Attorneys for the Intervenors, and mailed two copies with first class postage prepaid to the U.S. District Attorney, Federal Building, Tulsa, Oklahoma, who represented the United States in the U. S. D. C., Northern District, Oklahoma; and mailed two copies with airmail postage prepaid to Terrence L. O'Brien, Attorney, Department of Justice, Washington, D. C. 20530.

Shockley T. Shoemake

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A Member of the Bar of the
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JAN 28 19
MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1050

VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,
Appellant,

vs.

JOHN PAPPAN, Superintendent of the Osage Indian Agenty, John Slater, Field Solicitor of the Osage Indian Agency, Raymond L. Sanford, Regional Solicitor of the Department of the Interior, and Walter L. Hickel, Secretary of the Interior,
Appellees,

and Pearl Hall, Terrill Rae Bigheart, Bruce W. Gambill, Randy William Bigheart and Matthew Kane, Jr.,
Intervenor-Appellees.

BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE TENTH JUDICIAL CIRCUIT

BRUCE W. GAMBILL and
ROBERT P. KELLY
KELLY & GAMBILL
Sixth at Kihekah
Pawhuska, Oklahoma

Attorneys for Intervenor-Appellees

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(2) The questions on which the decision of the cause in the courts below are so unsubstantial and have been consistently ruled upon in favor of such judgment that there is no need for further argument 3

Conclusion 6

TABLE OF CASES CITED

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 73-1050

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BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE TENTH JUDICIAL CIRCUIT

PROPOSITION I

"PURSUANT TO RULE 24 OF THIS COURT INTERVENORS OBJECT TO THE JURISDICTION OF THIS COURT TO GRANT CERTIORARI HEREIN."

Appellant in her petition for Writ of Certiorari has invoked on page 2 the jurisdiction of this court under Title 28 U.S.C.A. §1254 (2). The section states:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

As stated, the Appellant has invoked the jurisdiction of this court in an attempt to overturn a decision of the Court of Appeals which, according to Appellant, holds a state law to be repugnant to the laws of the United States. She specifically limited the asserted jurisdiction to cited provision. The Statute specifically provides that a review within said section *precludes* a review by writ of certiorari.

While the rules of this court do not in the realm of certiorari provide for a Motion for Dismissal wherein the Appellant has not taken appeal in conformity to Statute as in Rule 16 (la) on appeals provision for the same is inculcate in Rule 24 providing for objections to the jurisdiction of the court to grant certiorari.

PROPOSITION II

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE IN THE COURTS BELOW ARE SO UNSUBSTANTIAL AND HAVE BEEN CONSISTENTLY RULED UPON IN FAVOR OF SUCH JUDGMENT THAT THERE IS NO NEED FOR FURTHER ARGUMENT.

The granting of a writ of certiorari is discretionary with the court. *Hyde* v. *Shine*, Cal. 1905, 25 S. Ct. 760, 199 U.S. 62, 50 L. Ed. 90.

The factual situation question herein resolves itself to, can a white woman elect to take a statutory forced share of a one-half or more blood deceased, restricted Osage Indian's restricted property?

This question has repeatedly and without exception held by the courts to be answered in the negative. The involved Act of February 27, 1925, Sec. 7 (43 Stat. 1008, 1011) as amended on September 1, 1950 (64 Stat. 572) provide in summary, that none but heirs who are a citizen of the United States and enrolled or have a lineal Indian ancestor enrolled on an Indian membership roll maintained by the Secretary of Interior, may inherit restricted Osage land, monies or interest from a decedent of one-half or more Osage Indian blood.

The proposition has been determined consistently by this court adversely to Appellant. In the case of *Blanset* v. *Cardin*, 1921, 256 U.S. 319, 41 S. Ct. 519, 65 L. Ed. 950 the exact factual problem was presented. The case arose in Oklahoma on essentially identical facts. A white man was disinherited by his Quapaw wife and sought to take restricted property utilizing the Oklahoma forced heir statute which is essentially similar as todays statute. The Quapaws, as with the Osages, had the right to make

a will for disposition of their property subject to rules of the Secretary of Interior. The court determined that the Act of Congress was prompted by prudence to "afford protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state law." The court concluded "that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testators bounty."

This court has, on similar grounds, determined that Congress can regulate as to inheritance of restricted Indian properties and that this classification, although based on race, is permissable. *Simmons* v. *Eagle Seelatsee*, 1966, 384 U.S. 209, 86 S. Ct. 1459, 16 Ed 2d 480.

The general powers to legislate such restrictions has a rich, consistent, judicial history. In the Oklahoma case of *Brader* v. *James*, 246 U.S. 8, 38 S. Ct. 285, 62 L. Ed. 591, the authority of Congress to impose restrictions on Indians who had been given citizenship and were residents of the State of Oklahoma at the time involved was determined. The Supreme Court of the United States said:

> "In view of the repeated decisions of this court we can have no doubt of the constitutionality of such legislation. While the tribal relation existed, the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of congress to safeguard the rights of Indians

still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the Marchie Tiger case. The doctrine is reiterated in Heckman v. United States, 224 U.S. 413, 56 L. Ed. 820, 32 Sup. Court Rep. 424, and United States v. Nice, 241 U.S. 591, 598, 60 L. Ed. 1192, 1195, 36 Sup. Ct. Rep. 496".

In dealing with Indian questions, it must be remembered that the powers of Congress are plenary. Stephens v. Cherokee Nation, 174 U.S. 445, 19 S. Ct. 772, 43 L. Ed. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 23 S. Ct. 216; 47 L. Ed. 299; Gritts v. Fisher, 224 U.S. 640, 32 S. Ct. 580, 56 L. Ed. 928; Cully v. Mitchell (C.C.A. 10) 37 F. (2d) 493, certiorari denied 281 U.S. 740, 50 S. Ct. 347, 74 L. Ed. 1154.****"

The Oklahoma Court in *Scioto Oil Co.* v. *O'Hern*, 670 Okl. 106, 169 P. 483, 494, stated:

"Section 1 of the Enabling Act provides: 'That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And Section 21:

"***And all laws in force in the territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said state, except as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States.***"

CONCLUSION

It is respectfully submitted that the Appellant has not vested this court with jurisdiction and that such issues as have been presented have consistently been ruled by this court in support of the court below. It is respectfully submitted that the Petition be denied.

Respectfully submitted,

BRUCE W. GAMBILL and
ROBERT P. KELLY
KELLY & GAMBILL
Sixth at Kihekah
Pawhuska, Oklahoma

Attorneys for Intervenor-Appellees

January, 1974

SUPREME COURT, U. S.

APR 9 1974

MICHAEL RODAK, JR., CLERK

No. 73-1050

In the Supreme Court of the United States

OCTOBER TERM, 1973

VELMA ROSE BIGHEART, PETITIONER

v.

JOHN PAPPAN, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
CARL STRASS,
TERRENCE L. O'BRIEN,
Attorneys,
Department of Justice,
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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E, A26–A31) is reported at 482 F. 2d 1066. The opinion of the district court (Pet. App. D, A21–A25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1973 (Pet. App. E, A26). A timely petition for rehearing was denied on September 21, 1973 (Pet. App. F, A32). On December 20, 1973, Mr.

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Justice Marshall extended the time for filing a petition for a writ of certiorari to January 5, 1974. The petition was filed on January 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Act of April 18, 1912, 37 Stat. 86, and the Act of February 27, 1925, 43 Stat. 1008 (as amended), limiting the devolution of property of Osage Indians held in trust by the United States to heirs of Indian blood, are constitutionally valid.

2. Whether those statutes were properly applied in this case to uphold the will of a deceased Osage Indian who did not leave to his estranged non-Indian wife the portion of his restricted estate generally required by Oklahoma law.

STATUTES INVOLVED

Section 8 of the Act of April 18, 1912, 37 Stat. 86, provides as follows:

> Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Section 7 of the Act of February 27, 1925, 43 Stat. 1008, as amended by the Act of September 1, 1950, 64 Stat. 572, provides:

> SEC. 7. Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided*, That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. *Provided further*, That this section shall not apply to spouses under marriages existing on February 27, 1925.

STATEMENT

William Bigheart, Jr. (Bigheart), an enrolled Osage Indian of at least one-half Osage blood,[1] died testate.

[1] Pet. App. C, A10–A11. Petitioner contests the administrative finding that Bigheart was of one-half (or more) Osage blood. Petitioner does not assert that Bigheart is less than half-blood Osage, but argues that he was not proved to have been of one-half or more Osage blood in the proceedings below. So far as we can determine, however, petitioner did not challenge the decedent's bloodlines in the administrative hearings. Moreover, Section 3 of the Act of March 3, 1921, 41 Stat. 1249, required the Secretary of the Interior to make a determination of the Indian blood of Osage Indians. Department records indi-

Section 8 of the Act of April 18, 1912 (hereafter the 1912 Act) requires Secretarial approval of any Osage will disposing of restricted property before the will can be admitted for probate in the Oklahoma courts. Pursuant to the 1912 Act a hearing was conducted under Department of the Interior procedures to consider Bigheart's most recent will dated June 27, 1967, and a codicil of July 7, 1967, which disposed of his restricted property (Pet. App. E, A27–A28). Those instruments revoked prior wills and codicils, provided a monthly payment to Bigheart's mother during her lifetime, and left the bulk of his estate to his children, substantially disinheriting petitioner, his estranged non-Indian wife, leaving her only ten dollars (*ibid.*).

At the hearing, petitioner contested Bigheart's mental capacity at the time of the 1967 will and codicil and sought Secretarial approval of a prior will dated November 15, 1965, which left a substantial portion of his estate to her (Pet. App. E, A27). The 1967 will and codicil were approved and the 1965 will disapproved (Pet. App. A & B, A1–A8). After an extensive administrative appeal (Pet. App. C, A9–A20),[2] peti-

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cate that Bigheart's grandfather and father were whole-blood Osage Indians. The Act of February 5, 1948, 62 Stat. 18, required the Secretary to issue a certificate of competency to members of the Osage tribe of less than one-half Indian blood. Bigheart had no such certificate. His lineage is thus a matter of department records, obviously noticed by the hearing examiner. See *Knight* v. *U.S. Land Association*, 142 U.S. 161, 169.

[2] Petitioner received administrative consideration even beyond the proceedings shown in the Appendix to the petition. Her request for reopening of the administrative appeal was considered, then denied, and the Acting Secretary responded to specific complaints she tended directly to him.

tioner sought judicial review of the Secretary's decision and a declaration that she is entitled to elect against the will in accordance with Oklahoma law.[3] She also sought a declaration of the unconstitutionality of the Act of February 27, 1925, 43 Stat. 1008, as amended by the Act of September 1, 1950, 64 Stat. 572 (hereafter the 1925 Act), which, even if the wills were invalid, would still prohibit her, as a non-Indian, from inheriting Osage-restricted property.

The district court found the Secretary's decision upholding the will to be supported by substantial evidence and concluded that the relevant statutes were constitutional and operated to the exclusion of contrary state law (Pet. App. D, A21–A25). The court of appeals affirmed (Pet. App. E, A26–A31).

ARGUMENT

The arguments advanced by petitioner do not warrant review by this Court. The court of appeals' decision rests on established principles of law, has limited application, and does not conflict with decisions of this Court or other courts of appeals.

1. The constitutional issue raised by petitioner has previously been resolved against her contentions. *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, affirming 244 F. Supp. 808 (E. D. Wash.). In that case a statute nearly identical to the 1925 Act, but applicable to the devolution of restricted property of the Yakima Tribe, was attacked as unconstitutional on the ground that by restricting inheritance of trust

[3] The Oklahoma laws providing a forced portion for a spouse are excerpted at Pet. 4–5.

property to persons of Indian blood it created an unconstitutional racial classification. The three-judge district court held the Act to be a constitutionally valid exercise of Congress' plenary power over tribal property and relations (244 F. Supp. at 813). It found the Act's references to percentages of Indian blood to be necessary measures in determining tribal membership and in legislating as to tribal affairs (*id.* at 814). This Court summarily affirmed, 384 U.S. 209. See also *Brader* v. *James*, 246 U.S. 88; *Ute Indian Tribe of the Uintah and Ouray Reservation* v. *Probst*, 428 F. 2d 491 (C.A. 10), certiorari denied, 400 U.S. 926.

2. Petitioner is not entitled to the forced-share of the decedent's estate she claims under state law. Congress has legislated to the contrary with respect to the devolution of Osage trust properties. Osage Indians may dispose of their restricted property by a will approved by the Secretary of the Interior (1912 Act). However, non-Indians are precluded from taking an intestate share from the restricted estate of a deceased, at least half-blood, Osage Indian (1925 Act) and, *a fortiori*, a non-Indian spouse is precluded from electing against the will of such an Indian, the Oklahoma forced-share statute notwithstanding. See *Blanset* v. *Cardin*, 256 U.S. 319. State law, of course, must give way to federal law in an area of federal competency. Const. Art. VI Cl. 2.[4]

[4] The Oklahoma courts have understood and applied the controlling federal law in the area of Indian inheritance. *Ware* v. *Beach*, 322 P. 2d 635 (Okla.), certiorari denied, 358 U.S. 819; *Mashunkashey* v. *Mashunkashey*, 191 Okl. 501, 134 P. 2d 976; *In re Smith's Estate*, 188 Okl. 158, 107 P. 2d 188; *In re Mar-*

The administrative findings that Bigheart's will, which, but for $10, excluded his estranged wife and divided his estate between his mother and his two children, was not unnatural, and that he had testamentary capacity at the execution of his will, are supported by the record. Administrative review and subsequent review of the entire administrative record by the district court and the court of appeals resulted in unanimity of opinion that the initial decision was supported by substantial evidence. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 618–621. That finding cannot be overturned simply because a contestant considers the will's provisions to be unfair or inequitable. Compare *Tooahnippah* v. *Hickel*, 397 U.S. 598, 607–610.[7]

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tin's Estate, 183 Okl. 177, 80 P. 2d 561. The cases cited by petitioner, *Soderstrom* v. *Bonner*, 180 Okl. 355, 71 P. 2d 117; *Record* v. *Record*, 178 Okl. 524, 63 P. 2d 973, as the court of appeals stated (Pet. App. E. A31), are inapposite.

[7] Petitioner's reliance on two civil rights Acts, Section 16 of the Act of May 31, 1870, 16 Stat. 140, 144, 42 U.S.C. 1981, and Section 1 of the Act of April 9, 1866, 14 Stat. 27, 42 U.S.C. 1982, is misplaced. The 1925 Act is a permissible exercise of the plenary power of Congress to control Indian trust properties. It is an attempt to preserve Indian properties for Indians. Discrimination, of the sort prohibited by the cited civil rights Acts, is not at issue here, see *Simmons* v. *Eagle Seelatsee*, *supra*. Moreover, the 1925 Act is a specific Act, passed by Congress after the more general 1870 Act and is thus, in the absence of constitutional infirmity, controlling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-612

VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,

Appellant,

VERSUS

JOHN PAPPAN, Superintendent of the Osage Indian Agency; JOHN SLATER, Field Solicitor of the Osage Indian Agency; RAYMOND L. SANFORD, Regional Solicitor of the Department of the Interior, and WALTER L. HICKEL, Secretary of the Interior,

Appellees,

and

PEARL HALL, TERRIL RAE BIGHEART, BRUCE W. GAMBILL, RANDY WILLIAM BIGHEART and MATTHEW KANE, JR.,

Intervenor-Appellees.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Intervenor-Appellees.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

I. INTRODUCTION

Section 3 of the Act of Congress of April 18, 1912, 37 Stat. 86 vests the probate courts of the State of Oklahoma with exclusive jurisdiction to probate the restricted estates of testate and intestate Osage Indian decedents while Sec-

tion 8 of such Act commits the devolution of estates of *testate* Osage decedents to Oklahoma law subject only to a proviso requiring approval of the wills of such decedents by the Secretary of the Interior as a condition to state court probate of such wills.

Section 8 of the Act of Congress of April 18, 1912 reads in pertinent part:

> "That any adult member of the Osage Tribe . . . not mentally incompetent . . . may dispose of . . . all of his estate . . . by will, in accordance with the laws of the State of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Of such section of such Act this Court said in *LaMotte* v. *United States*, 41 S.Ct. 204, 254 U.S. 570, 65 L.Ed. 410, that:

> "This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, *in accordance with the state law*, if his will be approved by the Secretary." (Emphasis supplied.)

The laws of the State of Oklahoma include 84 Okla. Stat. 44 which reads in pertinent part that:

> ". . . no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law. . . ."

Such laws also include 84 Okla. Stat. 213, the Oklahoma statute of succession, which is confined in its operation by its introduction which reads that:

> "When any person having title to any estate . . . dies without disposing of the estate by will, it descends and must be distributed in the following manner . . . ."

Petitioner urges that since her husband died testate she is excluded by the terms of 84 Okla. Stat. 213 from taking by inheritance a share of his estate so that if she is to take more than the Ten Dollars granted to her in the will she must take by force of 84 Okla. Stat. 44 a share of his estate not by means of but as measured by 84 Okla. Stat. 213.

The Government and Intervenors contend that Petitioner can take only the Ten Dollars given her in her husband's will unless she can prove that she is enrolled upon or is a blood descendant of an Indian enrolled upon a roll prepared by the Secretary of the Interior because Section 7 of the Act of Congress of 1925 provides in pertinent part that:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe . . . any restricted lands, money, or mineral interests of the Osage Tribe . . ."

an amendment to such act defining Indians as those enrolled upon or descended from those enrolled upon Indian rolls prepared by the Interior Secretary.

Petitioner has previously argued that both the Act of 1912 and that of 1925 are unconstitutional. Such contention being unheard, she now urges that whether such Acts are or are not unconstitutional she is entitled to take by force of Oklahoma law. 84 Okla. Stat. 44, a share of her husband's estate not by means of but as measured by the statute of

inheritance of Oklahoma, 84 Okla. Stat. 213. That neither Petitioner nor any other person taking by reason of 84 Okla. Stat. 44 can take under 84 Okla. Stat. 213 is to be seen from the introduction of such latter statute which is set forth above.

In urging that since the Act of 1912 commits the devolution of property of testate Osage decedents to state law that she takes by reason of a statute of such law, 84 Okla. Stat. 44, Petitioner calls to the attention of this Court the fact that her contention is upheld by the settled rule of property of the State of Oklahoma spelled out by its highest court in *Soderstrom* v. *Bonner* (Okla. 1937), 71 P.2d 117, the law and facts of which are identical to those here involved, which rule is that set out by W. F. Semple, Oklahoma Land Titles Annotated, Thomas Publishing Company, 1952. at Section 708 where we read that:

> "The restrictions placed by state laws upon a testator as to the disinheritance of a spouse and children apply to an Osage will with the same force and effect as to any other citizen of the state."

That this Court, or any other court, should enter a decision herein proscribing the marital state-declared right of this Petitioner to share in the estate of her husband is almost beyond belief, yet the Government and the Intervenors have successfully challenged the Oklahoma rule before the lower court by contending that (1) Petitioner seeks to take by inheritance a share of her husband's estate by inheritance but is prevented from doing so by reason of Section 7 of the Act of 1925, (2) The Oklahoma Court overlooked Section 7 of the Act of 1924 in writing its opin-

ion in *Soderstrom, supra,* and (3) the decision in this case is ruled by *Blanset* v. *Cardin,* 256 U.S. 319, rather than *Blundell* v. *Wallace,* 267 U.S. 664.

II. PROPOSITIONS OF THE PETITIONER

A. PETITIONER SEEKS TO TAKE A SHARE OF HER HUSBAND'S ESTATE BY FORCE OF 84 OKLA. STAT. 44 RATHER THAN BY INHERITANCE AND AS MEASURED BY RATHER THAN BY MEANS OF 84 OKLA. STAT. 213, THE OKLAHOMA STATUTE OF SUCCESSION.

While denying the constitutionality of the Acts of 1912 and 1925, Petitioner alleges that if such acts are constitutional a determination of the right of Petitioner to participate in the distribution of the estate of her husband requires a consideration of such acts in conjunction with 84 Okla. Stat. 44 and 84 Okla. Stat. 213.

Petitioner first urges that the Acts of 1912 and 1925 create separate, unrelated schemes for the testate and intestate devolution of the property of the decedent and since such statutes are not related by subject matter or internal reference and are not germane that neither scheme of distribution has any effect upon the other. Thus, should this Court hold that under 84 Okla. Stat. 44 the Petitioner takes by inheritance a share of her husband's estate Petitioner contends that the Act of 1925 is not applicable for it does not pertain to inheritance in the case of testacy by force of law, but refers to ordinary intestacy only. Thus, Petitioner contends, where the Secretary of the Interior has approved the will of a proscribed, deceased Osage Indian testator the scheme of Oklahoma law pertaining to testate devolution takes control of the distribution of the testator's prop-

erty and such property passes then by force of the testator's will dispositions plus those provisions engrafted upon such will by force of Oklahoma law and not by inheritance as such term is employed in the 1925 Act. Had this not been the intent of the Congress it is to be presumed that the Congress would have made specific reference in the Act of 1925 to state statutes governing the disposition of estates of *testators* rather than to a state of intestacy, which is the antithesis of testacy and which forms the sole subject of such latter act.

Petitioner next urges that she does not seek to take by inheritance and that the provisions of Oklahoma law prevent all persons similarly situated from seeking to take by inheritance for under the terms of the Oklahoma statute of succession inheritance follows only in those cases where a person:

> ". . . having title to any estate . . . dies *without* disposing of the estate by will. . . ." (Emphasis supplied.)

Any joint consideration of 84 Okla. Stat. 44 and 84 Okla. Stat. 213 must lead to the same result. One taking under the provisions of 84 Okla. Stat. 44 cannot take under the provisions of 84 Okla. Stat. 213 for 84 Okla. Stat. 44 becomes operative only in cases of testacy and not intestacy and where it becomes operative 84 Okla. Stat. 213 becomes inoperative. The intent of the Oklahoma Legislature thus appears to be that one who takes under and by reason of 84 Okla. Stat. 44 takes by force of that statute and not by inheritance a share of his deceased spouse's estate measured by rather than by means of 84 Okla. Stat. 213.

Statutes such as 84 Okla. Stat. 44 are found in other jurisdictions. That such statutes are considered a part of the law of wills rather than inheritance appears from *Irving Trust* v. *Day*, 314 U.S. 398, 86 L.Ed. 452, where this Court described the character of a statute similar to 84 Okla. Stat. 44 by saying that:

> "The condition clearly was such as New York might without restraint from the Federal Constitution annex to the privilege of making a will under its law.
>
> "Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life. . . ."

In re Greenberg, 184 N.E. 784, 87 A.L.R. 833, spoke of New York's 84 Okla. Stat. 44 analogue by saying:

> "The inconsistency in our old law which compelled a man to support his wife during his life and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases.
>
> "The new law provides against and prevents unjust provisions, cutting off the widow from her share of the estate, but it does not leave open the question whether the wife has offended her lord and master. It makes no rule for the individual case. Proper provision must be made for the widow where the statute is applicable."

In *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017, this Court held that under a similar Louisiana statute:

> "The people of Louisiana, through their legislature have carefully regulated many of the property rights

incident to family life. Louisiana law prescribes certain formalities requisite to the contracting of marriage. Once marriage is contracted there, husbands have obligations to their wives. Fathers have obligations to their children. . . . To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. *The surviving spouse is entitled to an interest in the deceased spouse's estate.* Legitimate children have a right of forced heirship in their father's estate. . . .

". . . the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The federal constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules.

". . . the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature, not the life-tenured judges of this Court, to select from among possible laws." (Emphasis supplied.)

Apropos of the approval of this Court of the philosophy upon which 84 Okla. Stat. 44 is based is the concurring opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, which appears in *Marie De Sylva* v. *Marie Ballentine*, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415, where the issue considered was that of whether under Section 24 of the Copyright Act of 1947 providing a right of renewal upon the author's death to his "widow, widower, or children" the author's legitimated but not adopted illegitimate

child shared as a member of such class in such right of renewal, *etc.* This Court held that the right of renewal was created by federal law but that the class should be determined by state law since such law, rather than federal law, defined familial relationships.

Of the Copyright Act, Mr. Justice Douglas said, in words appropriate to 84 Okla. Stat. 44, that:

> "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a conclusion different from that of the early English view. *The purpose and effect of the statute is to continue the support of dependents after a casualty.* To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. *The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent.*" (Emphasis supplied.)

Thus, despite the inability of the child to inherit from its father, the Court held that the child received a right under the statute not by inheritance but by force of the Act which Act had been designed for the moral purpose of providing by force of law for the right of a dependent of the deceased.

B. THE OPINION HANDED DOWN BY THE HIGHEST COURT OF THE STATE OF OKLAHOMA IN THE CASE OF SODERSTROM v. BONNER (OKLA. 1937), 71 P.2d 117, IS DECISIONALLY IDENTICAL IN FACTS AND LAW OF THE PRESENT CASE. SUCH OPINION IS BASED UPON 84 OKLA. STAT. 44, A PART OF THE LAWS OF THE STATE OF OKLAHOMA TO WHICH THE DEVOLUTION OF THE RESTRICTED PROPERTY OF THE DECEASED OSAGE TESTATORS IS EXCLUSIVELY COMMITTED BY SECTION 8 OF THE ACT OF CONGRESS OF APRIL 18, 1912, 37 STAT. 86, UPON APPROVAL OF SUCH WILLS BY THE SECRETARY OF THE INTERIOR. SUCH OPINION HAS BECOME A RULE OF PROPERTY AND SHOULD BE HELD TO GOVERN THE DECISION TO BE MADE HEREIN.

Soderstrom, supra, is a part of a group of three Oklahoma cases which form a rule of property, of the State of Oklahoma and which hold that Section 8 of the Act of Congress of April 18, 1912, 37 Stat. 86, commits the testate devolution of property of deceased Osage Indian testators to the laws of the State of Oklahoma pertaining to wills and the disposition of property of deceased testators to those members of his family or relatives provided for in such laws.

The first of such cases was handed down by the Oklahoma Court in 1936 in the case of *In re Revard's Estate*, 63 P.2d 973, where the Oklahoma Supreme Court considered the claim of a pretermitted child of a deceased, restricted Osage Indian testator and stated in its fourth headnote that:

> "By Section 8 of the Act of Congress of April 18, 1912 (37 Stat. 86, 88), a competent Osage Indian may dispose of his Osage headright by will, but in doing so he is bound by the general laws pertaining

to wills in Oklahoma, and the disposition to those members of his family or relatives or intentional omission thereof, which are set up in said laws."

At page 976 of the same opinion the Oklahoma Supreme Court said:

". . . Congress, in permitting Osage Indians of a certain class to dispose of this class of property by will, has attached the limitation thereon that such disposition shall be in accordance with the laws of the state of Oklahoma."

The Oklahoma Supreme Court then followed the reasoning of this Court in *Blundell* v. *Wallace*, 220 Pac. 40, 267 U.S. 664, *infra*, by saying that:

"In legislating concerning the testamentary disposition of property by restricted Indians, or the testamentary disposition of restricted property by competent Indians, Congress has frequently imposed certain limitations insuring that his family, or certain members thereof, or certain named close relatives, shall not be omitted. Sometimes, as in section 23 of the Act of Congress of April 26, 1906 (34 Stat. 145), those persons who must be remembered are named. In other acts they are not named, but it is apparent that Congress has adopted the law of wills as it exists in the state where the Indian usually resides. We are of the opinion that there can be little doubt but that Congress in enacting section 8 of the Act of Congress of April 18, 1912 (37 Stat. 86, 88), intended to adopt the general scheme of the statutes of Oklahoma pertaining to wills. . . .

"Paraphrasing the language of the above section, insofar as it pertains to the present question, Congress has thereby said that a competent Osage Indian

> may dispose of his personal property by will, 'in accordance with the laws of the State of Oklahoma.' . . . We cannot help but conclude, therefore, that Congress had in mind the requirements contained in our statutes on wills when it adopted the above act."

While *Revard, supra,* involved the right of a pretermitted child to take a share of his father's estate in the absence of a will making provision for him, *Soderstrom* v. *Bonner,* 71 P.2d 117, which followed *Revard,* involved the right of a surviving spouse of no determined blood of a deceased Osage testatrix of one-half Osage Indian blood to whom such testatrix had devised a portion of her property of but "negligible value" to take under the provisions of 84 Okla. Stat. 44 a share of his wife's estate measured by 84 Okla. Stat. 213, the Oklahoma statute of descent and distribution.

The headnote of *Soderstrom* outlines the facts, law and basis for the holding of the Court, as follows:

> "Testamentary disposition by competent adult Osage Indian held governed by Oklahoma law prohibiting spouse from bequeathing away from surviving spouse so much of estate that surviving spouse would receive less in value than through succession by law, notwithstanding testatrix executed will and died in New Mexico, where she was residing and where she owned personal property, where estate disposed of by will included real estate in Osage County, interest in Osage Indian headrights, and money to testatrix' credit, as restricted Osage Indian, in Treasury of United States (Act Cong. April 18, 1912, § 8, 37 Stat. 88; 84 Okl. St. Ann. §§ 44, 213, St. 1931, §§ 1539, 1617)."

while the syllabus by the Court recites the rule of the case as follows:

> "An adult member of the Osage Tribe of Indians not mentally incompetent, in the disposition of his property, is bound by the general laws pertaining to wills in Oklahoma, and the disposition to those members of his family or relatives which is provided in said laws. Act Cong. April 18, 1912, § 8, 37 Stat. 88; Sections 1539, 1617, O.S. 1931 (84 Okl. St. Ann. §§ 44, 213)."

Revard, supra, and *Soderstrom, supra,* were followed by *In re Mo-se-che-he's Estate* (Okla. 1940), 107 P.2d 999, the third of the Oklahoma cases to construe the Act of 1912. The first headnote of the latter case combines law, fact and holding, by saying:

> "An adult member of the Osage Tribe of Indians in disposing of any or all of his or her estate by will under congressional act, must do so, in accordance with the laws of the State of Oklahoma pertaining to wills, and hence will of unmarried Indian woman was revoked by her subsequent marriage, under Oklahoma statute providing that a will executed by an unmarried woman is revoked by a subsequent marriage. Act Cong. April 18, 1912, § 8, 37 Stat. 88; 84 Okl. St. Ann. § 108."

In its arguments the Government implies that Mo-se-che-he held the Act of 1925 applicable to cases involving wills. However, Fierro, the husband of Mo-se-che-he, was held entitled, without proof of blood, to contest the will and to obtain a decree finding Mo-se-che-he's will was revoked by her marriage to him because such will had been executed prior to her marriage to him and while she was unmarried and because the laws of the State of Oklahoma then provided by 84 Okla. Stat. 108 that a will executed by an unmarried woman was revoked by her subsequent marriage.

Soderstrom has been the law in the State of Oklahoma since the date of its rendition in 1937, twelve years after the passage of the 1925 Act. 84 Okla. Stat. 44 does not pertain to inheritance, for inheritance occurs only in the case of intestacy, which is the antithesis of testacy. Its provisions express a philosophy of the law of wills under which the aggrieved spouse takes by force of law and not by inheritance and hence the 1925 Act is not applicable.

Soderstrom has remained in effect, unchallenged for 37 years except for the decision of the lower court. Its rule has thus become a rule of property and should not be disturbed by the federal courts even though they might reach a different conclusion if the question were an open one. *Dunn* v. *Micco*, 106 F.2d 356, *cert. den.* Dec. 11, 1939; *U. S.* v. *Title Ins. Co.*, 265 U.S. 472, 486, 44 S.Ct. 621, 623, 68 L.Ed. 1110; *Minnesota Min. Co.* v. *National Min. Co.*, 18 L.Ed. 42.

C. IF THE DECISION TO BE MADE IN THIS CASE IS TO BE RULED BY A PRIOR DECISION OF THIS COURT OR AFFECTED THEREBY SUCH PRIOR DECISION IS BLUNDELL v. WALLACE, 267 U.S. 664, WHICH DISTINGUISHES THE DECISION MADE BY THIS COURT IN BLANSET v. CARDIN, 256 U.S. 319, WHICH LATTER OPINION HAS BEEN RELIED UPON BY THE GOVERNMENT THROUGHOUT THE SEVERAL STAGES OF THIS CASE.

The Government and Intervenors have successfully argued that the Act of 1925 should apply to this case because of the opinion of this Court entered in *Blanset* v. *Cardin, supra.*

Blanset and *Blundell* both arose from Oklahoma.

Blanset concerned a federal act pertaining to the Quapaw Tribe which follows the language outline of the Osage Act of 1912 but which is decisionally dissimilar thereto, the Quapaw Act reading in pertinent part:

> "That any person of the age of twenty-one years . . . shall have the right . . . to dispose of such property (restricted), *in accordance with regulations to be prescribed by the Secretary of the Interior:* Provided . . . That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of Interior. . . ." (Emphasis supplied.)

The total decisional dissimilarity between the Quapaw Act and the Osage Act appears upon consideration of the language of the Quapaw Act granting to the Quapaw testator the right to dispose of his restricted property:

> ". . . in accordance with regulations to be prescribed by the Secretary of the Interior. . . "

and the Osage Act granting to the Osage testator the right to dispose of his restricted property:

> ". . . in accordance with the laws of the State of Oklahoma. . . ."

Blundell, however, involved a Five Civilized Tribes Act structurally dissimilar but decisionally analogous to the Osage Act. This appears from the sole headnote of *Blundell* which reads that:

> "In view of the existing restriction upon alienation of Indian lands, § 23 . . . allowing testamentary disposition of property but providing that no will of a full-blood Indian devising real estate shall be valid if it

disinherits parent, spouse, or children, unless duly acknowledged, merely removed such existing restrictions and left Indian *wills subject to the provisions of the laws of the state where the Indians were situated;* and therefore, an Indian woman could not will more than two-thirds of her property away from her husband, if the state law forbade it." (Emphasis supplied.)

Since *Blundell* dealt with a case arising from Oklahoma where the Federal Act involved left the Indian wills:

". . . subject to the provisions of the laws of the state where the Indians were situated. . . ."

and since the Osage Testate Act of 1912 granted to the Osage testator the right to dispose of his restricted property:

". . . in accordance with the laws of the State of Oklahoma. . . ."

the similarity of the present case to *Blundell* and its dissimilarity to *Blanset* should not require further emphasis.

That the *Blundell* Court would not permit *Blanset* to govern this case appears from the following language of the *Blundell* Court:

". . . The effect of § 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in Blanset v. Cardin, 256 U.S. 319, 65 L ed 950, 41 Sup Ct Rep 519, cited to the contrary which militates against this view. That case involved the will of a Quapaw woman, devising her restricted lands away from her husband. . . . But the act there considered was very different from the one now under review. *There the authority to dispose of restricted*

property by will was limited by the provisions of the Act of February 14, 1913, Chap. 55, 37 Stat. at L. 678, Comp. Stat. 4338, 3 Fed. Stat. Anno. 2d 3d p. 855, that the will must be 'in accordance with regulation to be prescribed by the Secretary of the Interior,' and that no will 'shall be valid or have any force or effect unless and until it shall have been approved by that officer.' By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. *But here the Federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law."* (Emphasis supplied.)

Petitioner thus asks this Court to declare that 84 Okla. Stat. 44 applies to Osage wills with the same force as it applies to the wills of other citizens of the State of Oklahoma and asks the Court to hold that the Act of 1925 has no effect upon the application of 84 Okla. Stat. 44 to such wills, for here the Federal statute relative to testacy provides that Oklahoma law shall govern the devolution of the property of deceased Osage testators and is without qualification except in the single particular set forth in the proviso which was satisfied by the approval of the will by the Secretary, and thus does not stand in the way of the operation of the local law.

D. PETITIONER IS ENTITLED TO A REHEARING.

Petitioner abandons none of her previous contentions.

The Acts of 1912 and 1925 mock the Constitution, rob the State of Oklahoma of its plenary powers and rape Petitioner of her civil rights, all in the name of race, nothing more.

This case *was* decided at the District Court level by a Magistrate rather than by a Judge and Petitioner *was* denied an administrative appeal by the lower courts and the findings of the Trial Examiner *were* ignored, *etc.*

So certain that this Court would accept jurisdiction and right the wrongs done Petitioner, Counsel for Petitioner adumbrated rather than drove home the issue brought to this Court's attention by means of this petition. Moreover, her counsel indicated rather than expressed the point that *Soderstrom* established a rule of property and that for such reason *Soderstrom* should be permitted to stand whether or not this Court would have reached a contrary view had the question been an open one.

While *Erie Railroad* v. *Tomkins* is based upon diversity of citizenship there is even more reason for a holding in the instant case that this Court is bound by *Soderstrom* than would exist in an ordinary diversity case, for here the Congress committed the devolution of the property of the deceased Osage Indian testators to Oklahoma law and not to the judgment of the federal courts.

Moreover, in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, an exemplar cited by this Court in respect to the second ground for motion for rehearing provided by

Paragraph Two of Rule 58 of this Court, a case involving an automobile patent, this Court initially denied certiorari for lack of conflict but subsequently granted certiorari upon a showing that litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Since Congress has vested Oklahoma courts with exclusive venue and jurisdiction to determine the devolution of estates of deceased Osage testators, the reasoning applied in *Schriber-Schroth* applies with even greater force to this case.

It is surprising to a novice, even an ignorant one such as is counsel, to find the federal courts overturning the decisions of the State of Oklahoma pertaining to the laws of the State of Oklahoma and holding contrary thereto and contrary to the view of the leading textwriter upon the subject, especially since 37 years have passed since the *Soderstrom* opinion was written, with but two opinions, those of the two lower courts, being entered in opposition to it.

CONCLUSION

By its passage of Section 8 of the Act of Congress of 1912, *supra*, concerning the testamentary disposition of property by restricted Osage Indians and the testamentary disposition of restricted property by competent Osage Indians, the Congress adopted as the exclusive method to be employed in the testate devolution of such property of such Indians the law of wills of the State of Oklahoma, a part of which is 84 Okla. Stat. 44. Such section of such Act is broadly written, is in terms applicable to restricted lands and personalty and enables the Indian to dispose of any and all of his estate by will, in accordance with such state law, if his will be first approved by the Secretary of the Interior. Such section of such act is exclusive and relates solely and exclusively to testacy and is without qualification as to the operation of Oklahoma law except in the single particular set forth in the proviso, which proviso does not stand here, in the way of the operation of the local law.

Thus, a competent Osage Indian may dispose of his Osage headright by will, but in doing so he is bound by the laws of the State of Oklahoma pertaining to the disposition of his property to those members of his family or relatives, or the intentional omission thereof, which are set up in said laws of such state the provisions of which are engrafted upon his will.

Thus, the surviving spouse of a deceased Osage Indian testator takes by force of 84 Okla. Stat. 44, rather than by inheritance, a share of her deceased husband's estate measured by rather than by means of the Oklahoma statute

of succession, 84 Okla. Stat. 213, which, by its terms, is applicable only in cases of intestacy. It follows that the proscription of the Act of 1925 does not apply to such surviving spouse whatever her racial origin.

It follows that the restrictions placed by Oklahoma law upon a testator as to the disinheritance of his spouse and his children apply to an Osage will with the same force and effect as to any other citizen of the State of Oklahoma and this is the meaning of this Court in *Blundell, supra*, and that of the Oklahoma Supreme Court in *Soderstrom, supra*.

Respectfully submitted,

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June, 1974

CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay, and that on June 5, 1974, I mailed three copies of the foregoing petition for rehearing to Kelly & Gambill, Pawhuska, Oklahoma, and three copies to Kane & Kane, Pawhuska, Oklahoma, Attorneys for the Intervenors, and that I mailed three copies with first class postage prepaid to the U. S. District Attorney, Federal Building, Tulsa, Oklahoma, who represented the United States in the U. S. District Court, Northern District, Oklahoma; and mailed three copies with airmail postage prepaid to Terrence L. O'Brien, Attorney, Department of Justice, Washington, D. C. 20530.

Shockley T. Shoemake